

3-21-2011

# O'Shea v. High Mark Development Clerk's Record v. 5 Dckt. 37869

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Vol. 5 of 10  
IN THE

volume 5 of 9

LAW CLERK  
SUPREME COURT  
OF THE  
STATE OF IDAHO

THOMAS O'SHEA and ANNE O'SHEA,

trustees of the Thomas and Anne O'Shea trust.

Plaintiff and

Appellants

vs.

HIGH MARK DEVELOPMENT, LLC

DALE A. SCHNEIDER, MATTHEW F SMITH, THE CHILDRENS CENTER

Defendant and

Respondents

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Joel E. Tingey, District Judge

C. Timothy Hopkins

P.O. Box 51219, Idaho Falls, ID 83405-1219

Attorney for Appellant

Richard J. Armstrong

500 Eagle Gate Tower 60 East South Temple, SLC, UT 84111

Attorney for Respondent

Filed this day of 20

FILED - COPY  
MAY 21 2011

Clerk

By \_\_\_\_\_

Deputy

37869 COPY

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

THOMAS O'SHEA and ANNE )  
DONAHUE O'SHEA, Trustees of the )  
Thomas and Anne O'Shea Trust u/d/t )  
DATED NOVEMVER 2, 1998; )  
GRANDVIEW CREDIT, LLC, a )  
California Limited Liability company; )  
CALEB FOOTE, an individual, )  
KATE LARKIN DONAHUE, an )  
individual, JOHN KEVIN DONAHUE, )  
an individual, and SAN FRANCISCO )  
RESIDENCE CLUB, INC., a California )  
Corporation: )

Plaintiff/Appellants, )

vs. )

HIGH MARK DEVELOPMENT, LLC, )  
an Idaho limited liability company; )  
GORDON ARAVE, individually and as )  
Member of High Mark Development, LLC; )  
BENJAMIN ARAVE, individually and as )  
Member of High Mark Development, )  
LLC, and JOHN DOES I-X, )

Defendant/Respondents. )

---

THOMAS O'SHEA and ANNE )  
DONAHUE O'SHEA, Trustees of the )  
Thomas and Anne O'Shea Trust u/d/t )  
DATED NOVEMVER 2, 1998; )  
GRANDVIEW CREDIT, LLC, a )  
California Limited Liability company; )  
CALEB FOOTE, an individual, )  
KATE LARKIN DONAHUE, an )  
individual, JOHN KEVIN DONAHUE, )  
an individual, and SAN FRANCISCO )  
RESIDENCE CLUB, INC., a California )  
Corporation: )

Plaintiff/Appellants, )

Case No. CV-2008-4025

Docket No. 37869

Volume 5 of 9

vs.

DALE A. SCHNEIDER, an individual;  
MATTHEW F. SMITH, an individual; THE  
CHILDREN'S CENTER, INC., an Idaho  
Corporation and THE IDAHO CHILDREN'S  
CENTER, INC., an Idaho corporation,

Defendants.

\*\*\*\*\*

### CLERK'S RECORD ON APPEAL

\*\*\*\*\*

Appeal from the District Court of the  
Seventh Judicial District of the State of Idaho,  
in and for the County of Bonneville

HONORABLE Joel E. Tingey, District Judge.

\*\*\*\*\*

C. Timothy Hopkins, Esq.  
HOPKINS, RODEN, CROCKETT,  
HANSEN & HOOPES  
P.O. Box 51219  
Idaho Falls, ID 83405-1219

Richard J. Armstrong  
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*Attorney for Respondent*

## **TABLE OF CONTENTS**

	Page
Register of Actions (CV-08-2628), printed 9-20-10 .....	Vol.1-1
Register of Actions (CV-08-4025), printed 8-13-10 .....	Vol.1-4
Verified Complaint (CV-08-2628), filed 5-5-08 .....	Vol.1-21
Defendant's Answer to Plaintiff's Complaint, filed 11-7-08 .....	Vol.1-45
Verified Complaint (CV-08-4025), filed 7-8-08 .....	Vol.1-48
Order Shortening Time to File and Hear Motion, filed 9-12-08 .....	Vol.1-81
Minute Entry, dated 9-25-08 .....	Vol.1-84
Memorandum Decision and Order, filed 9-26-08 .....	Vol.1-87
First Amended Verified Complaint, filed 10-1-08 .....	Vol.1-93
Answer to First Amended Verified complaint and Third Party Complaint, filed 10-21-08.....	Vol.1-144
Answer to Third Party Complaint, filed 11-7-08 .....	Vol.2-157
Order for Telephonic Status Conference, filed 12-3-08.....	Vol.2-160
Order Granting Motion for Limited Admission, filed 12-15-08 .....	Vol.2-163
Order and Notice Setting Jury Trial, filed 12-15-08 .....	Vol.2-166
Order for Consolidation, filed 12-26-08.....	Vol.2-170
Minute Entry, dated 1-14-09 .....	Vol.2-174
Order, filed 1-16-09.....	Vol.2-178
Minute Entry, dated 1-27-09 .....	Vol.2-182
Minute Entry, dated 2-19-09 .....	Vol.2-186
Order, filed 2-20-09.....	Vol.2-190
Minute Entry, dated 5-5-09 .....	Vol.2-193

Order, filed 5-20-09.....	Vol.2-197
Order, filed 7-7-09.....	Vol.2-201
Minute Entry, dated 7-8-09 .....	Vol.2-205
Amended Order and Notice Setting Jury Trial, filed 7-8-09 .....	Vol.2-209
Order Granting Partial Judgment on the Pleadings, filed 11-13-09 .....	Vol.2-213
Motion for Partial Summary Judgment, filed 11-13-09 .....	Vol.2-217
Brief in Support of Motion for Partial Summary Judgment, filed 11-13-09 .....	Vol.2-221
Statement of Facts in Support of Motion for Partial Summary Judgment, filed 11-13-09 .....	Vol.2-238
Affidavit of Jeffrey L. Needs, filed 11-13-09.....	Vol.2-260
Affidavit of Marc J. Weinpel, filed 11-18-09.....	Vol.2-273
Affidavit of Sean J. Coletti, filed 11-13-09 through Exhibit E .....	Vol.2-280
Affidavit of Sean J. Coletti, filed 11-13-09 Exhibits F through K .....	Vol.4-455
Defendants' Cross Motion for Summary Judgment, filed 11-27-09 .....	Vol.4-563
Memorandum in Support of Defendants' Cross Motion for Summary Judgment, filed 11-27-10 .....	Vol.4-566
Statement of Facts in Support of Defendants' Cross Motion for Summary Judgment, filed 11-27-09 .....	Vol.4-593
Affidavit of Richard J. Armstrong, filed 11-27-09 through Exhibit S .....	Vol.5-626
Affidavit of Richard J. Armstrong, filed 11-27-09 Exhibits T through Exhibits RR .....	Vol.6-811
Objection to Defendants' Cross-Motion for Summary Judgment/Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 12-15-09 .....	Vol.7-994
Second Affidavit of Sean J. Coletti, filed 12-15-09 .....	Vol.7-1018

Statement of Facts in Opposition to Defendants' Cross-Motion for Summary Judgment, dated 12-15-09 .....	Vol.7-1073
Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 12-16-09 .....	Vol.7-1089
Statement of Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 12-16-09 .....	Vol.7-1099
Supplemental Affidavit of Richard J. Armstrong, filed 12-16-09.....	Vol.7-1110
Memorandum Decision and Order on Motions for Summary Judgment, filed 1-14-10 .....	Vol.7-1160
Order Granting Ex Parte Request to Appear at the February 10, 2010 Motion Hearing by Telephone, filed 2-5-10 .....	Vol.8-1181
Minute Entry, dated 2-10-10 .....	Vol.8-1188
Plaintiffs' Proposed Jury Instructions, filed 2-11-10 .....	Vol.8-1192
Defendant's Proposed Jury Instructions, filed 2-16-10 .....	Vol.8-1261A
Minute Entry, dated 2-16-10 .....	Vol.8-1262
Order, filed 2-16-10.....	Vol.8-1265
Plaintiffs' first Supplement to Proposed Jury Instructions, filed 2-22-10.....	Vol.8-1267
Objection to Defendants' Trial Brief and Proposed Jury Instructions, filed 2-22-10 .....	Vol.8-1296A
Defendants' Objection to Plaintiffs' Proposed Jury Instructions, filed 2-22-10 .....	Vol.8-1296M
Defendants' Supplemental Proposed Jury Instructions, filed 2-23-10 .....	Vol.8-1296X
Order, filed 2-24-10.....	Vol.8-1297
Minute Entry, dated 3-1-10 .....	Vol.8-1300
Jury Instructions .....	Vol.8-1329A
Verdict Form, 3-10-10.....	Vol.8-1330
Judgment Upon Verdict, filed 3-10-10.....	Vol.8-1333
Motion for Judgment Notwithstanding the Verdict, or, Alternatively Motion for New Trial, filed 3-22-10.....	Vol.9-1335

Brief in Support of Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for New Trial, filed 3-22-10 .....	Vol.9-1339
Memorandum in Opposition to Motion for Judgment Notwithstanding the Verdict. Or, Alternatively, for New Trial, filed 5-11-10.....	Vol.9-1358
Reply Brief in Support of Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for New Trial, filed 5-14-10.....	Vol.9-1395
Minute Entry, dated 5-18-10 .....	Vol.9-1408
Decision and Order on Motion for JNOV or New Trial, filed 5-28-10.....	Vol.9-1412
Minute Entry, dated 6-23-10 .....	Vol.9-1423
Order on Motion for costs and Attorney Fees, filed 7-2-10 .....	Vol.9-1425
Judgment of Costs and Attorney Fees, filed 7-2-10 .....	Vol.9-1431
Notice of Appeal, filed 7-8-10 .....	Vol.9-1433
Clerk's Certificate of Appeal, filed 7-16-10.....	Vol.9-1441
Clerk's Certificate of Appeal, dated 8-10-10 .....	Vol.9-1444
Order to Deposit Funds in an Interest Bearing Account, filed 8-31-10 .....	Vol.9-1445
Order Staying Execution and Releasing Judgment, Liens, filed 8-31-10 .....	Vol.9-1448
Defendants' Request for Additional Record on Appeal, filed 9-1-10.....	Vol.9-1451
Clerk's Certification of Exhibits, dated 9-23-10 .....	Vol.9-1456
Clerk's Certificate of Service, .....	Vol.9-1471



## INDEX

	Page
Statement of Facts in Opposition to Defendants' Cross-Motion for Summary Judgment, dated 12-15-09 .....	Vol.7-1073
Affidavit of Jeffrey L. Needs, filed 11-13-09.....	Vol.2-260
Affidavit of Marc J. Weinpel, filed 11-18-09.....	Vol.2-273
Affidavit of Richard J. Armstrong, filed 11-27-09 through Exhibit S .....	Vol.5-626
Affidavit of Richard J. Armstrong, filed 11-27-09 Exhibits T through Exhibits RR .....	Vol.6-811
Affidavit of Sean J. Coletti, filed 11-13-09 through Exhibit E .....	Vol.2-280
Affidavit of Sean J. Coletti, filed 11-13-09 Exhibits F though K .....	Vol.4-455
Amended Order and Notice Setting Jury Trial, filed 7-8-09 .....	Vol.2-209
Answer to First Amended Verified complaint and Third Party Complaint, filed 10-21-08.....	Vol.1-144
Answer to Third Party Complaint, filed 11-7-08 .....	Vol.2-157
Brief in Support of Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for New Trial, filed 3-22-10 .....	Vol.9-1339
Brief in Support of Motion for Partial Summary Judgment, filed 11-13-09 .....	Vol.2-221
Clerk's Certificate of Appeal, dated 8-10-10 .....	Vol.9-1444
Clerk's Certificate of Appeal, filed 7-16-10.....	Vol.9-1441
Clerk's Certificate of Service, .....	Vol.9-1471
Clerk's Certification of Exhibits, dated 9-23-10 .....	Vol.9-1456
Decision and Order on Motion for JNOV or New Trial, filed 5-28-10.....	Vol.9-1412
Defendant's Answer to Plaintiff's Complaint, filed 11-7-08 .....	Vol.1-45

Defendant's Proposed Jury Instructions, filed 2-16-10 .....	Vol.8-1261A
Defendants' Cross Motion for Summary Judgment, filed 11-27-09 .....	Vol.4-563
Defendants' Objection to Plaintiffs' Proposed Jury Instructions, filed 2-22-10 .....	Vol.8-1296M
Defendants' Request for Additional Record on Appeal, filed 9-1-10 .....	Vol.9-1451
Defendants' Supplemental Proposed Jury Instructions, filed 2-23-10 .....	Vol.8-1296X
First Amended Verified Complaint, filed 10-1-08 .....	Vol.1-93
Judgment of Costs and Attorney Fees, filed 7-2-10 .....	Vol.9-1431
Judgment Upon Verdict, filed 3-10-10.....	Vol.8-1333
Jury Instructions .....	Vol.8-1329A
Memorandum Decision and Order on Motions for Summary Judgment, filed 1-14-10 .....	Vol.7-1160
Memorandum Decision and Order, filed 9-26-08 .....	Vol.1-87
Memorandum in Opposition to Motion for Judgment Notwithstanding the Verdict. Or, Alternatively, for New Trial, filed 5-11-10 .....	Vol.9-1358
Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 12-16-09 .....	Vol.7-1089
Memorandum in Support of Defendants' Cross Motion for Summary Judgment, filed 11-27-10 .....	Vol.4-566
Minute Entry, dated 1-14-09 .....	Vol.2-174
Minute Entry, dated 1-27-09 .....	Vol.2-182
Minute Entry, dated 2-10-10 .....	Vol.8-1188
Minute Entry, dated 2-16-10 .....	Vol.8-1262
Minute Entry, dated 2-19-09 .....	Vol.2-186
Minute Entry, dated 3-1-10 .....	Vol.8-1300
Minute Entry, dated 6-23-10 .....	Vol.9-1423

Minute Entry, dated 7-8-09 .....	Vol.2-205
Minute Entry, dated 9-25-08 .....	Vol.1-84
Minute Entry, dated 5-18-10 .....	Vol.9-1408
Minute Entry, dated 5-5-09 .....	Vol.2-193
Motion for Judgment Notwithstanding the Verdict, or, Alternatively Motion for New Trial, filed 3-22-10.....	Vol.9-1335
Motion for Partial Summary Judgment, filed 11-13-09 .....	Vol.2-217
Notice of Appeal, filed 7-8-10 .....	Vol.9-1433
Objection to Defendants' Cross-Motion for Summary Judgment/Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 12-15-09.....	Vol.7-994
Objection to Defendants' Trial Brief and Proposed Jury Instructions, filed 2-22-10 .....	Vol.8-1296A
Order and Notice Setting Jury Trial, filed 12-15-08 .....	Vol.2-166
Order for Consolidation, filed 12-26-08.....	Vol.2-170
Order for Telephonic Status Conference, filed 12-3-08.....	Vol.2-160
Order Granting Ex Parte Request to Appear at the February 10, 2010 Motion Hearing by Telephone, filed 2-5-10 .....	Vol.8-1181
Order Granting Motion for Limited Admission, filed 12-15-08 .....	Vol.2-163
Order Granting Partial Judgment on the Pleadings, filed 11-13-09 .....	Vol.2-213
Order on Motion for costs and Attorney Fees, filed 7-2-10 .....	Vol.9-1425
Order Shortening Time to File and Hear Motion, filed 9-12-08 .....	Vol.1-81
Order Staying Execution and Releasing Judgment, Liens, filed 8-31-10 .....	Vol.9-1448
Order to Deposit Funds in an Interest Bearing Account, filed 8-31-10 .....	Vol.9-1445
Order, filed 1-16-09.....	Vol.2-178
Order, filed 2-16-10.....	Vol.8-1265

Order, filed 2-20-09.....	Vol.2-190
Order, filed 2-24-10.....	Vol.8-1297
Order, filed 5-20-09.....	Vol.2-197
Order, filed 7-7-09.....	Vol.2-201
Plaintiffs' first Supplement to Proposed Jury Instructions, filed 2-22-10 .....	Vol.8-1267
Plaintiffs' Proposed Jury Instructions, filed 2-11-10 .....	Vol.8-1192
Register of Actions (CV-08-2628), printed 9-20-10 .....	Vol.1-1
Register of Actions (CV-08-4025), printed 8-13-10 .....	Vol.1-4
Reply Brief in Support of Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for New Trial, filed 5-14-10.....	Vol.9-1395
Second Affidavit of Sean J. Coletti, filed 12-15-09 .....	Vol.7-1018
Statement of Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed 12-16-09 .....	Vol.7-1099
Statement of Facts in Support of Defendants' Cross Motion for Summary Judgment, filed 11-27-09 .....	Vol.4-593
Statement of Facts in Support of Motion for Partial Summary Judgment, filed 11-13-09 .....	Vol.2-238
Supplemental Affidavit of Richard J. Armstrong, filed 12-16-09.....	Vol.7-1110
Verdict Form, 3-10-10.....	Vol.8-1330
Verified Complaint (CV-08-2628), filed 5-5-08 .....	Vol.1-21
Verified Complaint (CV-08-4025), filed 7-8-08 .....	Vol.1-48

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Richard J. Armstrong, ISBN 5548  
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Telephone: (801) 366-6060  
Facsimile: (801) 366-6061

BONNEVILLE COUNTY  
IDAHO  
2009 NOV 27 PM 1:34

*Attorneys for Defendants*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE**

THOMAS O'SHEA and ANNE DONAHUE  
O'SHEA, Trustees of the Thomas and Anne  
O'Shea Trust u/d/t DATED NOVEMBER 2,  
1998; GRANDVIEW CREDIT, LLC, a  
California limited liability company; CALEB  
FOOT, an individual, KATE LARKIN  
DONAHUE, an individual, JOHN KEVIN  
DONAHUE, an individual, and SAN  
FRANCISCO RESIDENCE CLUB, INC., a  
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an  
Idaho limited liability company; GORDON  
ARAVE, individually and as Member of High  
Mark Development, LLC; JARED ARAVE,  
individually and as Member of High Mark  
Development, LLC; BENJAMIN D. ARAVE,  
individually and as Member of High Mark  
Development, LLC, and JOHN DOES I-X,

Defendants.

***AFFIDAVIT OF RICHARD J.  
ARMSTRONG***

Case No. CV-08-4025

Judge Joel Tingey

---

HIGH MARK DEVELOPMENT, LLC, an  
Idaho limited liability company; GORDON  
ARAVE, individually and as Member of High  
Mark Development, LLC; JARED ARAVE,  
individually and as Member of High Mark  
Development, LLC; BENJAMIN D. ARAVE,  
individually and as Member of High Mark  
Development, LLC,

Third-Party Plaintiffs,

v.

THE CHILDREN'S CENTER, INC., an Idaho  
corporation; THE IDAHO CHILDREN'S  
CENTER, INC., an Idaho corporation,

Third-Party Defendants.

---

STATE OF UTAH

COUNTY OF SALT LAKE

)  
:ss  
)

RICHARD J. ARMSTRONG, being first duly sworn, deposes and says:

1. I am over the age of 18 years old and am competent to testify to the matters stated herein.
2. I am an attorney for Defendants High Mark Development, LLC, Gordon Arave, Jared Arave, and Benjamin Arave in the above captioned case.
3. Attached and incorporated as Exhibit A is a true and correct copy of Plaintiffs' *First Amended Verified Complaint*.
4. Attached and incorporated as Exhibit B is a true and correct copy of selected pages of the Deposition of Thomas O'Shea.

5. Attached and incorporated as Exhibit C is a true and correct copy of selected pages of the Deposition of Anne O'Shea.
6. Attached and incorporated as Exhibit D is a true and correct copy of selected pages of the Deposition of Grandview Credit, LLC and its representative, Jack Chillemi.
7. Attached and incorporated as Exhibit E is a true and correct copy of selected pages of the Deposition of Kevin Donahue.
8. Attached and incorporated as Exhibit F is a true and correct copy of selected pages of the Deposition of the San Francisco Residence Club, Inc. and its representative, Kate Donahue.
9. Attached and incorporated as Exhibit G is a true and correct copy of selected pages of the Deposition of Caleb Foote.
10. Attached and incorporated as Exhibit H is a true and correct copy of selected pages of the Deposition of Gordon Arave.
11. Attached and incorporated as Exhibit I is a true and correct copy of the lease agreement dated June 19, 2006 between the Children's Center, Inc. and High Mark Development, LLC.
12. Attached and incorporated as Exhibit J is a true and correct copy of selected pages of the Deposition of Paul Fife.
13. Attached and incorporated as Exhibit K is a true and correct copy of the listing agreement between High Desert Realtors and High Mark Development, LLC.
14. Attached and incorporated as Exhibit L is a true and correct copy of the HUD-1 Settlement Statement relating to the purchase of the Property.

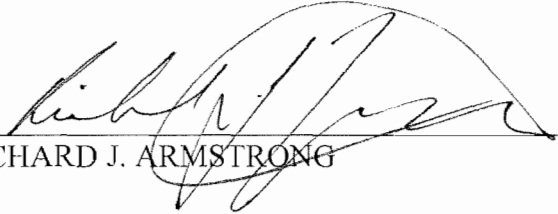
15. Attached and incorporated as Exhibit M is a true and correct copy of selected pages of the Deposition of Jeff Needs.
16. Attached and incorporated as Exhibit N is a true and correct copy of selected pages of the Deposition of Michael Shiffman.
17. Attached and incorporated as Exhibit O is a true and correct copy of the LoopNet Listing.
18. Attached and incorporated as Exhibit P is a true and correct copy of the parties' Commercial Real Estate Purchase and Sale Agreement and its five addenda.
19. Attached and incorporated as Exhibit Q is a true and correct copy of the Court's September 26, 2008 *Memorandum Decision and Order*.
20. Attached and incorporated as Exhibit R is a true and correct copy of the tenant's balance sheet.
21. Attached and incorporated as Exhibit S is a true and correct copy of the April 18, 2007 promissory note.
22. Attached and incorporated as Exhibit T is a true and correct copy of the tenant's 2005 federal income tax return.
23. Attached and incorporated as Exhibit U is a true and correct copy of the tenant's 2006 federal income tax return.
24. Attached and incorporated as Exhibit V is a true and correct copy of the tenant's partial profit and loss statement for January 1, 2007 to June 7, 2007.
25. Attached and incorporated as Exhibit W is a true and correct copy of selected pages of the Deposition of Matthew Smith.



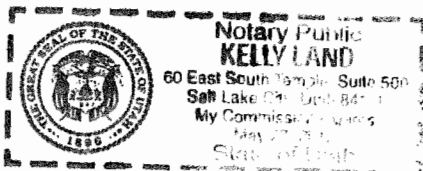
26. Attached and incorporated as Exhibit X is a true and correct copy of a federal complaint filed in the federal district of Alabama, case number 08-01423.
27. Attached and incorporated as Exhibit Y is a true and correct copy of a federal complaint filed in the federal district of Alabama, case number 09-00421.
28. Attached and incorporated as Exhibit Z is a true and correct copy of an Answer and Counterclaim filed in the federal district of Hawaii, case number 09-00191.
29. Attached and incorporated as Exhibit AA is a true and correct copy of the October 17, 2007 Estoppel Certificate.
30. Attached and incorporated as Exhibit BB is a true and correct copy of a November 26, 2007 fax from Paul Fife to Jeff Needs.
31. Attached and incorporated as Exhibit CC is a true and correct copy of a letter from Jeff Needs to Paul Fife dated October 2, 2007.
32. Attached and incorporated as Exhibit DD is a true and correct copy of a letter from Richard J. Armstrong to Paul Fife dated September 28, 2007.
33. Attached and incorporated as Exhibit EE is a true and correct copy of an Estoppel Certificate dated September 20, 2007.
34. Attached and incorporated as Exhibit FF is a true and correct copy of a fax from Jeff Needs to Paul Fife.
35. Attached and incorporated as Exhibit GG is a true and correct copy of an Estoppel Certificate dated September 24, 2007.
36. Attached and incorporated as Exhibit HH is a true and correct copy of an Estoppel Certificate dated September 27, 2007.

37. Attached and incorporated as Exhibit II is a true and correct copy of a letter from Jeff Needs to Paul Fife dated October 12, 2007.
38. Attached and incorporated as Exhibit JJ is a true and correct copy of selected pages of the Deposition of Chris Johnson.
39. Attached and incorporated as Exhibit KK is a true and correct copy of the October 18, 2007 Letter Agreement.
40. Attached and incorporated as Exhibit LL is a true and correct copy of the November 7, 2007 promissory note.
41. Attached and incorporated as Exhibit MM is a true and correct copy of a letter from Richard J. Armstrong to the tenant's attorney, dated September 18, 2007.
42. Attached and incorporated as Exhibit NN is a true and correct copy of a letter from the plaintiff investors' attorney to the defendants' attorney dated October 3, 2008.
43. Attached and incorporated as Exhibit OO is a true and correct copy of a lease agreement between the Family Care Center, Inc. and Thomas O'Shea.
44. Attached and incorporated as Exhibit PP is a true and correct copy of selected pages of the Deposition of Benjamin Arave.
45. Attached and incorporated as Exhibit QQ is a true and correct copy of the June 1, 2005 promissory note.
46. Attached and incorporated as Exhibit RR is a true and correct copy of the October 1, 2005 promissory note.

DATED this 24<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
RICHARD J. ARMSTRONG

SUBSCRIBED AND SWORN to before me this 24<sup>th</sup> day of November, 2009.



  
\_\_\_\_\_  
NOTARY PUBLIC

A

633

HOPKINS RODEN CROCKETT  
HANSEN & HOOPES, PLLC  
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BONNEVILLE COUNTY  
IDAHO

2009 OCT -1 PM 4:38

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE  
DONAHUE O'SHEA, Trustees of the  
Thomas and Anne O'Shea Trust u/d/t  
DATED NOVEMBER 2, 1998;  
GRANDVIEW CREDIT, LLC, a  
California limited liability company;  
CALEB FOOTE, an individual,  
KATE LARKIN DONAHUE, an  
individual, JOHN KEVIN  
DONAHUE, an individual, and SAN  
FRANCISCO RESIDENCE CLUB,  
INC., a California corporation;

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT,  
LLC, an Idaho limited liability  
company; GORDON ARAVE,  
individually and as Member of High  
Mark Development, LLC; JARED  
ARAVE, individually and as Member  
of High Mark Development, LLC;  
BENJAMIN ARAVE, individually  
and as Member of High Mark  
Development, LLC, and JOHN DOES  
I-X,

Defendants.

Case No. CV-08-4025

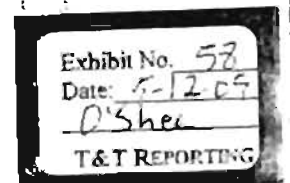
FIRST AMENDED VERIFIED  
COMPLAINT

COME NOW the Plaintiffs, and for cause of action against the Defendants,

complain and allege as follows:

FIRST AMENDED VERIFIED COMPLAINT - I

634



HOPKINS RODEN CROCKETT  
HANSEN & HOOPES, PLLC  
Gregory L. Crockett, ISBN 1640  
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428 Park Avenue  
P. O. Box 5121  
Idaho Falls, Idaho 83405-1219  
Telephone: 208-523-4445  
Attorneys for Plaintiff

BONNEVILLE COUNTY  
IDAHO

2008 OCT -1 PM 4:38

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE  
DONAHUE O'SHEA, Trustees of the  
Thomas and Anne O'Shea Trust u/d/t  
DATED NOVEMBER 2, 1998;  
GRANDVIEW CREDIT, LLC, a  
California limited liability company;  
CALEB FOOTE, an individual,  
KATE LARKIN DONAHUE, an  
individual, JOHN KEVIN  
DONAHUE, an individual, and SAN  
FRANCISCO RESIDENCE CLUB,  
INC., a California corporation;

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT,  
LLC, an Idaho limited liability  
company; GORDON ARAVE,  
individually and as Member of High  
Mark Development, LLC; JARED  
ARAVE, individually and as Member  
of High Mark Development, LLC;  
BENJAMIN ARAVE, individually  
and as Member of High Mark  
Development, LLC, and JOHN DOES  
I-X,

Defendants.

Case No. CV-08-4025

FIRST AMENDED VERIFIED  
COMPLAINT

COME NOW the Plaintiffs, and for cause of action against the Defendants,  
complain and allege as follows:

## GENERAL ALLEGATIONS

1. That Plaintiffs are collectively the owners of certain real property (hereinafter "Property") located in Bonneville County, Idaho, a professional office building, at 1675 Curlew Drive, Ammon, Idaho 83406 and particularly described as follows:

Lot 1, Block 1, Oak Ridge, Division No. 1, to the City of Ammon, Bonneville County, Idaho, according to the plat recorded thereof March 29, 2001, as Instrument No. 1044372.

2. High Mark Development, LLC ("High Mark") is an Idaho limited liability company with its principal place of business in Bingham County, Idaho.

3. The individual Defendants, Gordon Arave, Jared Arave, and Benjamin Arave, are residents of the State of Idaho and owners and/or member/managers of High Mark. Gordon Arave, individually and representing High Mark, was also the seller of the property mentioned in Paragraph 1.

4. John Does I through X are unknown and unnamed owners, shareholders, officers, directors and/or managers of High Mark, its agents or co-conspirators who are or may be liable to the Plaintiffs for damages alleged herein.

5. Sometime in 2005, Matthew F. Smith, Manager of M. Smith Enterprises, LLC, leased from Gordon Arave a professional office building at 1619 Curlew Drive, Ammon, Idaho 83406, prior to completion of the construction of a neighboring property mentioned in Paragraph 1.

6. On June 20, 2006, The Children's Center, Inc. ("The Children's Center"), Matthew F. Smith acting as President, entered into a Lease Agreement with High Mark and Gordon Arave for the lease of the property at 1675 Curlew for a ten (10) year term.

7. Some advertising and promotion of the subject property was published and disseminated by Paul Fife ("Fife"), Defendants' exclusive real estate listing and selling agent, including, but not limited to, a LoopNet® listing, a copy of which is attached hereto as Exhibit A and made a part hereof by this reference. The information and representations stated in such advertising and promotional was provided to Fife by Benjamin Arave ("Benjamin") and Scott Williams, an employee and agent of the Defendants. Plaintiffs were therefore and thereby informed that the subject property was fully leased for a ten-year term on a triple net basis; and that the tenant was paying full rent and CAM charges on a timely basis. Plaintiffs had a right to rely and did rely on the information they were provided by the Defendants and their agents. A copy of Fife's exclusive listing agreement is attached hereto as Exhibit B and is made a part hereof by this reference.

8. On August 11, 2007, Fife responded to a question by Plaintiffs' real estate agent, Jeff Needs ("Needs") by sending an email which stated that Gordon Arave was the seller of the subject property.

9. During the early fall of 2007, Plaintiffs began dealing with High Mark and its officers through Fife for the purchase of the subject Property. As part of



their negotiations, Plaintiffs asked to review financial information concerning the tenant, The Children's Center. Gordon Arave signed, both individually and as a member of High Mark, a Non-Disclosure Agreement regarding The Children's Center's financial information. The financial information provided did not disclose that The Children's Center had not been paying its rent.

10. Based on the information provided through the advertising and marketing materials and financial documents indicating that the building had a good paying tenant, on August 9, 2007 Plaintiffs entered into an RE-23 Commercial/Investment Real Estate Purchase and Sale Agreement ("Agreement"). This Agreement was signed and initialed by Defendant Gordon Arave, signing as "Gordon Arave" and also as "Gordon Arave, High Mark Dev. LLC." As a precondition of Plaintiffs' purchase of the Property, Plaintiffs requested and Defendant Gordon Arave promised that The Children's Center would complete and High Mark would deliver a Lease Estoppel Certificate ("Certificate") upon which the Plaintiffs could rely verifying the tenancy as represented in the offering information and advertising. Gordon Arave also signed, as the "Seller", both individually and on behalf of High Mark Development, LLC, several addenda to the Agreement. A true and correct copy of the Agreement and its addenda are attached hereto and incorporated herein as Exhibit C.

**The October 17, 2007 Lease Estoppel Certificate.**

11. At the request of Plaintiffs, Defendants' attorney, Richard Armstrong, Esq. ("Armstrong"), requested that a representative of The Children's Center

sign a Lease Estoppel Certificate. Matthew Smith signed the Certificate, dated October 17, 2007, which was addressed to "the O'Shea Family Trust and its assignees ('Purchaser')". A true and correct copy of the Certificate is attached hereto and incorporated herein as Exhibit D. The Certificate states, inter alia, that "no other agreements exist between Tenant and Landlord."

12. Paragraph 5 of the Certificate stated that "All minimum monthly rent has been paid to the end of the current calendar month, which is September 2007, and no rent under the Lease has been paid more than one month in advance as of its due date."

13. Paragraph 7 of the Certificate stated that "The undersigned is not in default under the Lease and is current in the payment of any taxes, utilities, or other charges required to be paid by the undersigned."

14. The Certificate ended by stating "This certification is made with the knowledge that it will be relied upon by Purchaser, Purchaser's lender, and any successor or assignee of Purchaser's right to purchase the Property in connection with financing and sale of the Property and the purchase of the Property by Purchaser."

15. Defendants provided Plaintiffs with the Certificate prior to Plaintiffs' purchase of the Property with the intent that the Plaintiffs would rely on the Certificate. Plaintiffs did rely on the facts set forth therein and had Plaintiffs known the true facts would not have purchased the property.

16. On October 24, 2007, Gordon Arave signed, as the "Seller," both individually and as a representative of High Mark, an Addendum to the Purchase and Sale

Agreement stating that "Buyer accepts the estoppel signed by Tenant on October 17, 2007."

17. On November 27, 2007, Gordon Arave sent to the President of The Children's Center information showing that, through December 31, 2007, The Children's Center then owed \$26,221.22 in CAM charges.

18. Plaintiffs completed the purchase of the subject Property from High Mark in December of 2007 and as a part of such transaction and by way of assignment and assumption, became the "Lessor" under that certain Lease Agreement dated June 20, 2006 between High Mark as "Lessor" and The Children's Center, as "Lessee".

19. In October, November, and December of 2007, The Children's Center failed to make its lease and CAM charge payments to High Mark of \$28,987.50 per month.

**The October 18, 2007 Agreement.**

20. In October of 2007, Gordon Arave individually and as "manager/member" of High Mark, and Jared Arave, individually, signed an agreement with Matthew Smith as President of The Children's Center, contingent upon the closing of the sale of the Property to Plaintiffs, as follows:

- a. Jared Arave and Gordon Arave would release The Children's Center from its promissory note dated April 18, 2007 in the amount of \$199,900.00;
- b. The Children's Center would sign the estoppel certificate dated October 17, 2007;

c. The Children's Center would release all interests it had to two options to purchase, one of which related to the Idaho Falls building which is the subject Property of this Complaint; and

d. Matthew F. Smith would sign a promissory note amending an October 1, 2005 promissory note between High Mark and M. Smith Enterprises, LLC, agreeing to pay Defendants the balance of the note on an amortized payment schedule.

A true and correct copy of said Agreement is attached hereto and incorporated herein as Exhibit E. Plaintiffs had no knowledge of this Agreement until June, 2008.

21. The Children's Center has never made a rent or CAM payment to Plaintiffs since Plaintiffs became owners of the Property and Lessors under the lease.

22. The Children's Center vacated the premises at 1675 Curlew Drive, Ammon, Idaho on or before March 1, 2008 without ever having paid rent or common area charges to Plaintiff.

**The June 1, 2005 Promissory Note.**

23. On June 1, 2005, Matthew F. Smith signed a Promissory Note for \$100,000 for rent past due and owing on the property at 1619 Curlew Drive. The Note was made payable to the order of Gordon Arave.

A true and correct copy of said Promissory Note is attached hereto and incorporated herein as Exhibit F.

**The October 1, 2005 Promissory Note.**

24. On October 1, 2005, Matthew F. Smith signed a Promissory Note for \$100,000 for rent past due and owing on the property at 1619 Curlew Drive. The Note was made payable the order of Gordon Arave.

A true and correct copy of said Promissory Note is attached hereto and incorporated herein as Exhibit G.

**The April 18, 2007 Promissory Note.**

25. On April 18, 2007, Matthew F. Smith signed a Promissory Note for \$199,900.00 on behalf of The Children's Center, for unpaid rent on the Property at 1675 Curlew Drive. The Note was made payable to the order of Jared Arave and Gordon Arave.

A true and correct copy of said Promissory Note is attached hereto and incorporated herein as Exhibit H.

**The November 7, 2007 Promissory Note.**

26. On November 7, 2007, Armstrong contacted legal counsel for The Children's Center by email asking when rent and CAM charges on the Property would be paid. Armstrong stated that his "client" had asked if Armstrong could contact The Children's Center about the possibility of satisfying The Children's Center's overdue rent obligations through issuance of another promissory note, stating that the note would "defer rent payments for October and November 2007." Armstrong also stated, "Mr. Smith's LLC is still required to make timely payments under the other outstanding note to

Mr. Arave.” Armstrong drafted a promissory note and sent it to The Children’s Center to satisfy the overdue rent and CAM charge obligation for October and November 2007. A true and correct copy of said e-mail message is attached hereto and incorporated herein as Exhibit I.

27. Matthew Smith then signed a Promissory Note on November 7, 2007, payable to High Mark with payments beginning December 1, 2007, for the principal sum of \$57,975.00, the equivalent of two months’ rent and CAM charges for lease of the subject Property. A true and correct copy of the Promissory Note is attached hereto and incorporated herein as Exhibit J.

**Defendants’ Fraud and Nondisclosure.**

28. At all pertinent times, Defendants represented that the Center was a bona fide paying tenant under a long-term lease and that the lease payments were current and that the lease was not in default.

29. High Mark and its officers at no time informed Plaintiffs of the financial problems of The Children’s Center, its failure to make rent payments, the existence of the June 1, 2005, October 1, 2005, April 18, 2007, or November 7, 2007 promissory notes, or the October 18, 2007 agreement pertaining to the execution of the Certificate and the cancellation of indebtedness of The Children’s Center if they signed the agreed Certificate or the fact that The Children’s Center was in default under the Lease.

30. The Plaintiffs only discovered the existence of the October 2007 Agreement and the subject Promissory Notes following their purchase and the tenant's abandonment of the Property.

#### COUNT I

#### BREACH OF CONTRACT

31. The Plaintiffs incorporate paragraphs 1 through 30 of this Complaint as though the same were here set forth in full verbatim.

32. On Addendum 1 of the Commercial Purchase and Sale Agreement, Defendants promised that "Seller shall deliver to Buyer and [sic] estoppels for the Tenant 10 days prior to Closing. Should the information provided on the estoppels differ from the information provided by Seller, Buyer shall have the option to terminate the Agreement and receive full refund of Earnest Money." (See Exhibit C). The Agreement is signed by Gordon Arave both individually and on behalf of High Mark as the "Seller."

33. Defendants, either individually or through their agents, materially breached the Commercial Purchase and Sale Agreement by negligently and/or fraudulently misrepresenting in the Lease Estoppel Certificate that all minimum monthly rent had been paid to the end of September 2007, and that The Children's Center was current in the payment of taxes, utilities, or other charges required to be paid.

34. Plaintiffs have been substantially injured and damaged on account of Defendants' breach as, were it not for their misrepresentations, Plaintiffs would not have

purchased the Property for which The Children's Center has failed to pay rent for each and every month following Plaintiffs' purchase of the property.

35. Plaintiffs' damages are not less than the sum of \$28,987.50 per calendar month from January 2008 through the expiration of the lease term on June 19, 2016.

## **COUNT II**

### **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

36. The Plaintiffs incorporate paragraphs 1 through 35 of this Complaint as though the same were here set forth in full verbatim.

37. Defendants owed Plaintiffs a duty of good faith and fair dealing in the Commercial Purchase and Sale Agreement and with regard to the information contained in the Lease Estoppel Certificate.

38. Defendants, either individually or through their agents, breached this implied covenant of good faith and fair dealing by negligently and/or fraudulently misrepresenting in the Lease Estoppel Certificate that all minimum monthly rent had been paid for the period at least to the end of September 2007, and that The Children's Center was current in the payment of taxes, utilities, or other charges required to be paid.

39. Plaintiffs have been substantially injured and damaged on account of Defendants' breach as, were it not for their misrepresentations, Plaintiffs would not have purchased the said property.



## GENERAL ALLEGATIONS

1. That Plaintiffs are collectively the owners of certain real property (hereinafter "Property") located in Bonneville County, Idaho, a professional office building, at 1675 Curlew Drive, Ammon, Idaho 83406 and particularly described as follows:

Lot 1, Block 1, Oak Ridge, Division No. 1, to the City of Ammon, Bonneville County, Idaho, according to the plat recorded thereof March 29, 2001, as Instrument No. 1044372.

2. High Mark Development, LLC ("High Mark") is an Idaho limited liability company with its principal place of business in Bingham County, Idaho.

3. The individual Defendants, Gordon Arave, Jared Arave, and Benjamin Arave, are residents of the State of Idaho and owners and/or member/managers of High Mark. Gordon Arave, individually and representing High Mark, was also the seller of the property mentioned in Paragraph 1.

4. John Does I through X are unknown and unnamed owners, shareholders, officers, directors and/or managers of High Mark, its agents or co-conspirators who are or may be liable to the Plaintiffs for damages alleged herein.

5. Sometime in 2005, Matthew F. Smith, Manager of M. Smith Enterprises, LLC, leased from Gordon Arave a professional office building at 1619 Curlew Drive, Ammon, Idaho 83406, prior to completion of the construction of a neighboring property mentioned in Paragraph 1.

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Telephone: 208-523-4445  
Attorneys for Plaintiff

BONNEVILLE COUNTY  
IDAHO

2008 OCT -1 PM 4:38

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE  
DONAHUE O'SHEA, Trustees of the  
Thomas and Anne O'Shea Trust u/d/t  
DATED NOVEMBER 2, 1998;  
GRANDVIEW CREDIT, LLC, a  
California limited liability company;  
CALEB FOOTE, an individual,  
KATE LARKIN DONAHUE, an  
individual, JOHN KEVIN  
DONAHUE, an individual, and SAN  
FRANCISCO RESIDENCE CLUB,  
INC., a California corporation;

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT,  
LLC, an Idaho limited liability  
company; GORDON ARAVE,  
individually and as Member of High  
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ARAVE, individually and as Member  
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sign a Lease Estoppel Certificate. Matthew Smith signed the Certificate, dated October 17, 2007, which was addressed to "the O'Shea Family Trust and its assignees ('Purchaser')". A true and correct copy of the Certificate is attached hereto and incorporated herein as Exhibit D. The Certificate states, inter alia, that "no other agreements exist between Tenant and Landlord."

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b. The Children's Center would sign the estoppel certificate dated October 17, 2007;

c. The Children's Center would release all interests it had to two options to purchase, one of which related to the Idaho Falls building which is the subject Property of this Complaint; and

d. Matthew F. Smith would sign a promissory note amending an October 1, 2005 promissory note between High Mark and M. Smith Enterprises, LLC, agreeing to pay Defendants the balance of the note on an amortized payment schedule.

A true and correct copy of said Agreement is attached hereto and incorporated herein as Exhibit E. Plaintiffs had no knowledge of this Agreement until June, 2008.

21. The Children's Center has never made a rent or CAM payment to Plaintiffs since Plaintiffs became owners of the Property and Lessors under the lease.

22. The Children's Center vacated the premises at 1675 Curlew Drive, Ammon, Idaho on or before March 1, 2008 without ever having paid rent or common area charges to Plaintiff.

**The June 1, 2005 Promissory Note.**

23. On June 1, 2005, Matthew F. Smith signed a Promissory Note for \$100,000 for rent past due and owing on the property at 1619 Curlew Drive. The Note was made payable to the order of Gordon Arave.

A true and correct copy of said Promissory Note is attached hereto and incorporated herein as Exhibit F.



**The October 1, 2005 Promissory Note.**

24. On October 1, 2005, Matthew F. Smith signed a Promissory Note for \$100,000 for rent past due and owing on the property at 1619 Curlew Drive. The Note was made payable the order of Gordon Arave.

A true and correct copy of said Promissory Note is attached hereto and incorporated herein as Exhibit G.

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25. On April 18, 2007, Matthew F. Smith signed a Promissory Note for \$199,900.00 on behalf of The Children's Center, for unpaid rent on the Property at 1675 Curlew Drive. The Note was made payable to the order of Jared Arave and Gordon Arave.

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**The November 7, 2007 Promissory Note.**

26. On November 7, 2007, Armstrong contacted legal counsel for The Children's Center by email asking when rent and CAM charges on the Property would be paid. Armstrong stated that his "client" had asked if Armstrong could contact The Children's Center about the possibility of satisfying The Children's Center's overdue rent obligations through issuance of another promissory note, stating that the note would "defer rent payments for October and November 2007." Armstrong also stated, "Mr. Smith's LLC is still required to make timely payments under the other outstanding note to

Mr. Arave.” Armstrong drafted a promissory note and sent it to The Children’s Center to satisfy the overdue rent and CAM charge obligation for October and November 2007. A true and correct copy of said e-mail message is attached hereto and incorporated herein as Exhibit I.

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**Defendants’ Fraud and Nondisclosure.**

28. At all pertinent times, Defendants represented that the Center was a bona fide paying tenant under a long-term lease and that the lease payments were current and that the lease was not in default.

29. High Mark and its officers at no time informed Plaintiffs of the financial problems of The Children’s Center, its failure to make rent payments, the existence of the June 1, 2005, October 1, 2005, April 18, 2007, or November 7, 2007 promissory notes, or the October 18, 2007 agreement pertaining to the execution of the Certificate and the cancellation of indebtedness of The Children’s Center if they signed the agreed Certificate or the fact that The Children’s Center was in default under the Lease.

30. The Plaintiffs only discovered the existence of the October 2007 Agreement and the subject Promissory Notes following their purchase and the tenant's abandonment of the Property.

#### COUNT I

#### BREACH OF CONTRACT

31. The Plaintiffs incorporate paragraphs 1 through 30 of this Complaint as though the same were here set forth in full verbatim.

32. On Addendum 1 of the Commercial Purchase and Sale Agreement, Defendants promised that "Seller shall deliver to Buyer and [sic] estoppels for the Tenant 10 days prior to Closing. Should the information provided on the estoppels differ from the information provided by Seller, Buyer shall have the option to terminate the Agreement and receive full refund of Earnest Money." (See Exhibit C). The Agreement is signed by Gordon Arave both individually and on behalf of High Mark as the "Seller."

33. Defendants, either individually or through their agents, materially breached the Commercial Purchase and Sale Agreement by negligently and/or fraudulently misrepresenting in the Lease Estoppel Certificate that all minimum monthly rent had been paid to the end of September 2007, and that The Children's Center was current in the payment of taxes, utilities, or other charges required to be paid.

34. Plaintiffs have been substantially injured and damaged on account of Defendants' breach as, were it not for their misrepresentations, Plaintiffs would not have

purchased the Property for which The Children's Center has failed to pay rent for each and every month following Plaintiffs' purchase of the property.

35. Plaintiffs' damages are not less than the sum of \$28,987.50 per calendar month from January 2008 through the expiration of the lease term on June 19, 2016.

## **COUNT II**

### **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

36. The Plaintiffs incorporate paragraphs 1 through 35 of this Complaint as though the same were here set forth in full verbatim.

37. Defendants owed Plaintiffs a duty of good faith and fair dealing in the Commercial Purchase and Sale Agreement and with regard to the information contained in the Lease Estoppel Certificate.

38. Defendants, either individually or through their agents, breached this implied covenant of good faith and fair dealing by negligently and/or fraudulently misrepresenting in the Lease Estoppel Certificate that all minimum monthly rent had been paid for the period at least to the end of September 2007, and that The Children's Center was current in the payment of taxes, utilities, or other charges required to be paid.

39. Plaintiffs have been substantially injured and damaged on account of Defendants' breach as, were it not for their misrepresentations, Plaintiffs would not have purchased the said property.

40. Plaintiffs' damages are not less than the sum of \$28,987.50 per calendar month from January 2008 through the expiration of the lease term on June 19, 2016.

### COUNT III

#### NEGLIGENT AND/OR FRAUDULENT MISREPRESENTATION

41. The Plaintiffs incorporate paragraphs 1 through 40 of this Complaint as though the same were here set forth in full verbatim.

42. Defendants, either individually or through their agents, at all times represented to Plaintiffs that The Children's Center was in good standing in its lease payments to High Mark, and did not at any time inform Plaintiffs that The Children's Center was not making its lease payments.

43. Defendants failed to inform Plaintiffs that The Children's Center and/or its President had signed promissory notes on June 1, 2005, October 1, 2005 and April 18, 2007 for unpaid rent.

44. Defendants failed to inform Plaintiffs that The Children's Center failed to pay rent for October, November, or December 2007, or that The Children's Center had signed a promissory note for the rent for October and November.

45. Defendants' statements, either individually or through their agents, to Plaintiffs regarding The Children's Center's payment of rent were material in that Plaintiffs would not have purchased the Property but for their understanding that there

was a bona fide tenant in good standing under a long-term lease; and that the lease was not in default.

46. Defendants knew, at the time of closing on the Property, that their statements, either individually or through their agents, to Plaintiffs regarding The Children's Center's payment of rent on the Property were false, or that the Plaintiffs relied on the existence of a bona fide lease and failure to inform the Plaintiffs of the true facts constitutes a fraudulent misrepresentation by omission and silence.

47. Defendants intended that the falsity of their statements and/or silence would be relied upon by Plaintiffs in purchasing the Property.

48. Plaintiffs were unaware at any time prior to or at closing on the Property of the existence of the June 1, 2005, October 1, 2005, April 18, 2007, and November 7, 2007 promissory notes, the October 18, 2007 agreement or that The Children's Center had not made its rent payments for October or November, or December of 2007.

49. Plaintiffs relied upon Defendants' false statements, made either individually or through their agents, in purchasing the Property.

50. Plaintiffs' reliance was justifiable, in that there was no way for Plaintiffs to know that The Children's Center had not made its rent payments for October, November or December of 2007; and the Plaintiffs were entitled to rely on the representations set forth in the Estoppel Certificate dated October 17, 2007.

51. Plaintiffs have been substantially injured and damaged because of the Defendants' actions and the fact that The Children's Center has failed to pay rent under its Lease Agreement for each and every month following Plaintiff's purchase of the Property. Plaintiff's damages are not less than \$28,987.50 per month from January 2008 through June 19, 2016.

52. The Plaintiffs have satisfied all conditions precedent to this cause of action including all notice requirements required under the subject Lease Agreement including, but not limited to, all duties of performance required by the Lessor under the subject Lease Agreement.

53. The Defendants were negligent in their representations to the Plaintiffs, whether individually or through their agents; which negligence has caused the Plaintiffs' substantial damages in an amount to be proven at trial.

#### **COUNT IV**

#### **NEGLIGENT AND/OR FRAUDULENT CONCEALMENT OF FACT MATERIAL TO TRANSACTION**

54. Plaintiffs reallege paragraphs 1 through 53 of this Complaint as though the same were here set forth in full verbatim.

55. Defendants concealed or failed to disclose the fact that The Children's Center failed to pay its lease and CAM payments for October, November, and December of 2007.

56. Defendants concealed or failed to disclose the fact that The Children's Center and/or its President had signed promissory notes on June 1, 2005, October 1, 2005, April 18, 2007, and November 7, 2007, for unpaid rent.

57. Defendants' concealment of The Children's Center's nonpayment of rent was material in that Plaintiffs would not have purchased the Property but for its understanding that there was a tenant in good standing; and that lease payments would produce substantial cash flow.

58. Defendants failed to disclose material facts to Plaintiffs in an effort to deceive Plaintiffs into believing that a good paying tenant existed and therefore inducing Plaintiffs' purchase of the Property.

59. Plaintiffs at no time prior to or at the time of closing knew of the facts concealed by Defendants.

60. Plaintiffs would not have proceeded with the transaction if they had known that The Children's Center was not making its rent payments.

61. Plaintiffs have sustained damages due to Defendants' concealment or non-disclosure of The Children's Center's nonpayment of rent.

62. The Plaintiffs are entitled to a rescission of the purchase and sale and to be entirely restored to their pre-contract status and position.



## COUNT V

### ATTORNEY'S FEES

63. Plaintiffs reallege paragraphs 1 through 62 of this Complaint as if the same were here set forth in full verbatim.

64. The Plaintiffs have and will continue to incur substantial attorney's fees and costs in prosecuting and bringing this action and the Plaintiffs have a right to recover their attorney's fees and costs incurred and to be incurred herein in accordance with Paragraph 25 of the Commercial Purchase and Sale Agreement and Idaho Code §§12-120 and 12-121.

65. The sum of \$15,000.00 is a reasonable attorney fee should this matter be uncontested by the Defendants herein; but the Court should award such additional and further fees and costs should this matter be contested by the Defendants or any of them.

WHEREFORE, the Plaintiffs pray the judgment, order and decree of this Court, as follows:

1. That Judgment be entered for the Plaintiffs and against each of the Defendants, jointly and severally;
2. That the Plaintiffs be awarded rescission of the purchase;
3. That the Plaintiffs be awarded their damages in an amount to be proven at trial but not less than the sum of \$28,987.50 per calendar month from January 2008 through the expiration of the lease term on June 19, 2016;

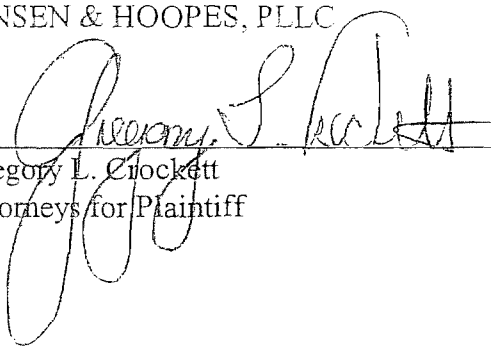
4. That the Plaintiffs be awarded their costs and reasonable attorney's fees incurred and to be incurred herein; and

5. That the Plaintiffs be awarded such other and further relief as may be just and equitable in the premises.

DATED this 12<sup>th</sup> day of October, 2008.

HOPKINS RODEN CROCKETT  
HANSEN & HOOPES, PLLC

By

  
\_\_\_\_\_  
Gregory L. Crockett  
Attorneys for Plaintiff

STATE OF CALIFORNIA)  
County of Alameda) ss.

THOMAS O'SHEA, being first duly sworn, deposes and says:

That I am the one of the Plaintiffs in the above-entitled action, that I have read the above and foregoing First Amended Verified Complaint, know the contents thereof, and that I believe the facts therein stated to be true.

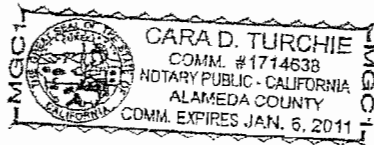
Thomas O'Shea  
THOMAS O'SHEA

SUBSCRIBED AND SWORN to before me this 30<sup>th</sup> day of

September, 2008.

S  
E  
A  
L

Cara D. Turchie  
Notary Public for California  
Residing at: 5111 Telegraph Oakland, CA  
My Commission Expires: 1-6-2011



B

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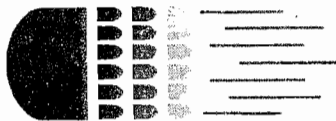
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas and )  
Anne O'Shea Trust u/d/t DATED ) Case No.  
NOVEMBER 2, 1998; GRANDVIEW CREDIT, ) CV-08-4025  
LLC, a California limited liability )  
company; CALEB FOOTE, an individual, )  
KATE LARKIN DONAHUE, an individual, )  
JOHN KEVIN DONAHUE, an individual, )  
and SAN FRANCISCO RESIDENCE CLUB, )  
INC., a California corporation; )  
Plaintiffs, )  
vs. )  
HIGH MARK DEVELOPMENT, LLC, an Idaho )  
limited liability company; GORDON )  
ARAVE, individually and as Officer )  
of High Mark Development, LLC; )  
BENJAMIN D. ARAVE, individually and )  
as Officer of High Mark Development, )  
LLC, )  
Defendants. )

DEPOSITION OF THOMAS O'SHEA

Tuesday, May 12, 2009, 10:00 a.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

**COPY**

REPORTED BY:

Sandra D. Terrill,  
RPR, CSR

PREPARED FOR:

MR. ARMSTRONG

Post Office Box 51020  
IDAHO FALLS, IDAHO 83405  
208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

DEPOSITION OF THOMAS O'SHEA - 05/12/09

SHEET 2 PAGE 5

1 (The deposition proceeded at  
2 10:04 a.m. as follows:)  
3  
4 Thomas O'Shea,  
5 produced as a witness at the instance of the  
6 defendants, having been first duly sworn, was  
7 examined and testified as follows:  
8  
9 EXAMINATION  
10 BY MR. ARMSTRONG:  
11 Q. State your full name, please.  
12 A. Thomas O'Shea.  
13 Q. And what is your date of birth?  
14 A. [REDACTED]  
15 Q. And where were you born?  
16 A. In Ireland, County Kerry, K-e-r-r-y.  
17 Q. Are you a U.S. citizen?  
18 A. Yes, I am.  
19 Q. When did you become a U.S. citizen?  
20 A. Approximately 1970. 1970,  
21 approximately.  
22 Q. And you're currently married, correct?  
23 A. Yes.  
24 Q. And you are married to Anne Donahue  
25 O'Shea?

PAGE 7

1 in that case?  
2 A. Yes.  
3 Q. Did that case go to trial?  
4 A. No.  
5 Q. What was the result in that case?  
6 A. It was settled.  
7 Q. Were you seeking damages in that case?  
8 A. Yes.  
9 Q. Were you represented by counsel in  
10 that case?  
11 A. Yes.  
12 Q. Who represented you?  
13 A. Mr. Mayers.  
14 Q. Do you have a full name?  
15 A. Mr. Mayers. I forget his first name.  
16 Q. Other than that deposition, did you  
17 give a deposition in any other matter?  
18 A. No.  
19 Q. Have you ever testified in court?  
20 A. Yes.  
21 Q. And when did you testify in court?  
22 A. About 20 years ago.  
23 Q. What kind of a case?  
24 A. It was an employee of mine that was  
25 fired, I believe, by an insurance company. And he

PAGE 6

1 A. That's correct.  
2 Q. Is she also from Ireland?  
3 A. No, she's not.  
4 Q. Where is she from?  
5 A. She's from Berkley, California.  
6 Q. How long have you been married?  
7 A. 18 years.  
8 Q. Have you ever had your deposition  
9 taken before?  
10 A. Yes.  
11 Q. When did you have your deposition  
12 taken?  
13 A. Approximately seven or eight years  
14 ago.  
15 Q. In what kind of a case?  
16 A. Construction of our home.  
17 Q. Was that a lawsuit that you had filed?  
18 A. Yes.  
19 Q. And what was the nature of the claims  
20 in that lawsuit?  
21 A. Leakages in our home, and we sought  
22 damages from the subcontractors.  
23 Q. Was it new construction?  
24 A. Yes.  
25 Q. And you testified or gave a deposition

PAGE 8

1 was now an employee of mine, and I was asked to  
2 testify about his capabilities.  
3 Q. Okay. Were you named in the  
4 complaint?  
5 A. No.  
6 Q. So you were just a witness in the  
7 case?  
8 A. Yes.  
9 Q. You were not a party?  
10 A. No.  
11 Q. Are you a party in any other lawsuit  
12 other than this matter that we're having your  
13 deposition taken in?  
14 A. Yes.  
15 Q. Can you give me the names of those  
16 cases or what those cases are?  
17 A. It's in Huntsville, Alabama. The  
18 family, we own property there, and we have a  
19 lawsuit against the agent and the broker who  
20 represented us at the time.  
21 Q. Do you have a name or a caption for  
22 the case?  
23 A. I believe there are several  
24 defendants. The main defendant is Scott McDermott,  
25 agent/broker for Coldwell Banker. And there are

SHEET 4 PAGE 13

1 A. Do I have any documents?  
 2 Q. Correct. Complaint, answer, anything?  
 3 A. Me personally?  
 4 Q. Yes.  
 5 A. No.  
 6 Q. You don't get served -- or you don't  
 7 get copies of documents when they get submitted to  
 8 the other side?  
 9 A. My wife is handling that mostly. I  
 10 have little or nothing to do with that.  
 11 Q. So your wife -- if there were  
 12 documents that either of you have, she would be the  
 13 one that would know if you have documents?  
 14 A. Yes.  
 15 Q. Have you ever been convicted of a  
 16 crime?  
 17 A. No.  
 18 Q. Has your wife ever been convicted of a  
 19 crime?  
 20 A. No.  
 21 Q. Who is Grandview Credit, LLC?  
 22 A. I believe that's an LLC that is owned  
 23 by Jack Chillemi.  
 24 Q. Jack Chillemi, who is he?  
 25 A. He was a neighbor of mine. Has now

PAGE 14

1 moved.  
 2 Q. And do you understand him to be the  
 3 owner or principal of Grandview Credit?  
 4 A. Yes.  
 5 Q. Is Grandview Credit a credit union?  
 6 Is it a bank? Do you know what it is?  
 7 A. I don't know what it is.  
 8 Q. And Grandview Credit is actually one  
 9 of the tenants in common under your tenancy in  
 10 common agreement --  
 11 A. Yes.  
 12 Q. -- related to the 1675 Curlew  
 13 property?  
 14 A. Yes.  
 15 Q. Who is Caleb Foote?  
 16 A. He is also a neighbor of ours.  
 17 Q. He's not a relative?  
 18 A. No.  
 19 Q. He still is a neighbor of yours?  
 20 A. Yes.  
 21 Q. How old is Caleb?  
 22 A. How old?  
 23 Q. Yes.  
 24 A. I'm only approximating. 65-ish.  
 25 Q. And who is Kate Larkin Donahue?

PAGE 15

1 A. She is my sister-in-law.  
 2 Q. Who is John Kevin Donahue?  
 3 A. He is my brother-in-law.  
 4 Q. Married to Kate?  
 5 A. No.  
 6 Q. Do you own any shares in the San  
 7 Francisco Residence Club?  
 8 A. I do not, no. My wife does.  
 9 Q. Does she own that, and does your trust  
 10 own any shares in the San Francisco --  
 11 A. No.  
 12 Q. And your wife, how many shares does  
 13 she own?  
 14 A. I don't know how many shares she owns.  
 15 Q. Is she a majority owner?  
 16 A. No. I believe the San Francisco  
 17 Residence Club is owned equally between the family  
 18 members.  
 19 Q. Okay. And is Anne the one that  
 20 initially owned San Francisco Residence Club?  
 21 A. No. The mother and the father.  
 22 Q. So Anne's mother and father owned San  
 23 Francisco Residence Club?  
 24 A. Yes.  
 25 Q. Do you have any connection with the

PAGE 16

1 San Francisco Residence Club other than your being  
 2 married to Anne?  
 3 A. No.  
 4 Q. You're not a manager of that entity?  
 5 A. No.  
 6 Q. Do you sit on the board?  
 7 A. No.  
 8 Q. Do you run any kind of daily  
 9 operations --  
 10 A. No.  
 11 Q. -- of the San Francisco Residence  
 12 Club?  
 13 A. No.  
 14 Q. Do you have any children?  
 15 A. Yes.  
 16 Q. How many?  
 17 A. Two.  
 18 Q. What are their ages?  
 19 A. One is 12, and one is 6.  
 20 Q. What are their names? The  
 21 12-year-old?  
 22 A. Siobhan.  
 23 Q. And the 6-year-old?  
 24 A. Sive.  
 25 Q. How do you spell that?

1 Q. What year?  
 2 A. Roughly, I'm not sure of the year,  
 3 approximately 1978.  
 4 Q. What's the highest level of education  
 5 of your wife, Anne?  
 6 A. She has a law degree.  
 7 Q. Where did she get her law degree?  
 8 A. University of San Francisco.  
 9 Q. Is that where you met Anne?  
 10 A. No.  
 11 Q. Is Anne related at all to Mike  
 12 Shiffman?  
 13 A. No.  
 14 Q. Has Mike Shiffman been the family  
 15 attorney for years?  
 16 A. Yes.  
 17 Q. Has he been the attorney for San  
 18 Francisco Residence Club?  
 19 A. Yes.  
 20 Q. How about for the other investors in  
 21 this property at 1675?  
 22 A. Here in Idaho?  
 23 Q. Correct.  
 24 A. He has been helping, yes, as an  
 25 attorney.

1 Q. Has he represented the other investors  
 2 in the 1675 Curlew Avenue prior to your purchase of  
 3 the 1675 Curlew?  
 4 A. No, not all of the investors.  
 5 Q. Which ones has he represented?  
 6 A. Just the Donahues and the O'Sheas.  
 7 Q. When did you first learn about a  
 8 potential for exchanging or buying the property at  
 9 1675 Curlew?  
 10 A. I learned from Jeff Needs in the  
 11 summer of '07.  
 12 Q. Tell me about how that contact  
 13 occurred. Did Jeff call you? Did he send you an  
 14 e-mail?  
 15 A. I think he called me. I think he  
 16 called me. I had been in touch with Jeff for a  
 17 couple of years prior to that. He was a friend.  
 18 Q. Okay.  
 19 A. And I knew he was in the business of  
 20 commercial real estate.  
 21 Q. So you knew Jeff several years before  
 22 you purchased the 1675 property?  
 23 A. Correct.  
 24 Q. As we go through today, I'm going to  
 25 refer to the Curlew property as the 1675 property;

1 is that fair?  
 2 A. That's fair.  
 3 Q. How did you know Jeff?  
 4 A. I met him through a friend.  
 5 Q. Was he living in California at the  
 6 time?  
 7 A. No, I don't believe so.  
 8 Q. What friend, mutual friend, did you  
 9 meet him through?  
 10 A. The Lynds family, L-y-n-d-s.  
 11 Q. Are they in California?  
 12 A. Yes, they are.  
 13 Q. And did you meet him at a dinner party  
 14 or some sort of a social event?  
 15 A. Meet who?  
 16 Q. Jeff Needs.  
 17 A. I believe I first met him at a dinner  
 18 party.  
 19 Q. And then you've maintained that  
 20 friendship --  
 21 A. That's right.  
 22 Q. -- since that first meeting?  
 23 A. That's correct.  
 24 Q. And what did Jeff tell you when he  
 25 talked to you about this property, the 1675

1 property?  
 2 A. He talked to us about the positive  
 3 points of investing in Idaho, particularly in  
 4 Idaho. And then he went from Boise to Idaho Falls.  
 5 He came across this property in Idaho Falls, and he  
 6 represented to us that it was a very attractive,  
 7 and we believed that it was.  
 8 Q. What did he tell you as far as what  
 9 the benefits were as far as investing in property  
 10 in Idaho?  
 11 A. That it was economically sound at the  
 12 time, and that there were a lot of investors coming  
 13 into Idaho, and that the economy was solid.  
 14 Q. So was his contacting you initially  
 15 about investing in property in Idaho, was that  
 16 related to the 1675 property, or was it just we  
 17 ought to start looking at property in Idaho?  
 18 A. In general it was about Idaho.  
 19 Q. So when he was talking to you about  
 20 investing in Idaho, he hadn't yet located the 1675  
 21 property?  
 22 A. No.  
 23 Q. Do you know how that arose when he  
 24 contacted you about the 1675 property?  
 25 A. I believe he called me and told me



SHEET 7 PAGE 25

1 about this particular property in Idaho Falls, and  
 2 I believe he had come across it in some  
 3 advertising.  
 4 Q. Had you given him instruction that  
 5 sounds good to look for some property that we could  
 6 invest in?  
 7 A. He knew that we were looking for  
 8 properties at the time to invest in.  
 9 Q. Okay. Did he know that you  
 10 were looking to do a 1031 like-kind exchange?  
 11 A. He did, yes.  
 12 Q. Do you remember when it was that Jeff  
 13 Needs contacted you, the month that he contacted  
 14 you specifically about the 1675 property?  
 15 A. I'm only guessing about the month, but  
 16 I'm guessing around July or August. It was in the  
 17 summer sometime of '07.  
 18 Q. Did you then tell Jeff at that time  
 19 that you'd like to pursue that property, have it  
 20 looked at as a potential investment?  
 21 A. I believe I did.  
 22 Q. Did you have an ongoing arrangement or  
 23 contract with Jeff Needs to look for property for  
 24 you in Idaho?  
 25 A. No, I did not.

PAGE 26

1 Q. Did you ever sign a listing agreement  
 2 or an agency agreement with Jeff Needs?  
 3 A. I'm not sure about that right now. If  
 4 we did, it wasn't prior to the Idaho property. If  
 5 we did sign a listing agreement, it was after I  
 6 indicated an interest in the property.  
 7 Q. Okay. He testified that -- when I  
 8 deposed him in Boise --  
 9 A. Yes.  
 10 Q. -- he testified that there was never  
 11 an agency agreement in writing between you and Jeff  
 12 Needs?  
 13 A. Yeah.  
 14 Q. Does that refresh your memory?  
 15 A. I would believe that, yes.  
 16 Q. So you have no reason to question his  
 17 testimony?  
 18 A. I have no reason to question his  
 19 testimony.  
 20 Q. Were you aware that under Idaho law if  
 21 you don't have a written agency agreement with an  
 22 agent that you're an unrepresented party as a  
 23 matter of --  
 24 A. I wasn't aware of that.  
 25 Q. Jeff Needs never told you that?

PAGE 27

1 A. I don't recall that.  
 2 Q. Do you know who it was -- we don't  
 3 have the documents yet, but there was a real estate  
 4 purchase agreement. Very good. If you can turn in  
 5 this binder to tab 23. Do you recognize that  
 6 document?  
 7 A. Yes.  
 8 Q. Do you know what that is?  
 9 A. It's a purchase agreement.  
 10 Q. Specifically, it's a commercial  
 11 investment real estate purchase and sale agreement,  
 12 correct?  
 13 A. Yes.  
 14 Q. Do you know who prepared this  
 15 particular document?  
 16 A. I know that Jeff Needs sent it to me.  
 17 I'm not sure who prepared it.  
 18 Q. Did Mike Shiffman prepare it, to your  
 19 knowledge?  
 20 A. I don't believe he did.  
 21 Q. Are you familiar -- prior to this  
 22 transaction relating to the 1675 property that is  
 23 the subject of this case, had you entered into  
 24 previous purchase and sale agreements that are  
 25 similar to that found at tab 23?

PAGE 28

1 A. Regarding other properties?  
 2 Q. Regarding other properties.  
 3 A. I have signed purchase agreements  
 4 before. I believe they're all slightly different.  
 5 Q. But generally similar?  
 6 A. Yes.  
 7 Q. The layout, basic terms of the  
 8 transaction?  
 9 A. Yes.  
 10 Q. There is a signed version of this  
 11 agreement. If you'll turn to tab 52. Do you  
 12 recognize the document at tab 52 that we'll mark --  
 13 we'll mark that as Exhibit \*-052 to your  
 14 deposition, and we'll just follow the tabs.  
 15 Do you recognize that document?  
 16 A. I recognize it to be something similar  
 17 to, if not identical to, the one we just looked at.  
 18 Q. Is that your initial on the first  
 19 page, the bottom left-hand corner?  
 20 A. I believe it is. I believe it is.  
 21 Q. And the date of that initial is August  
 22 14th, 2007, correct?  
 23 A. That is correct.  
 24 MR. CROCKETT: I would like the record to  
 25 indicate that this is not the full text of the

1 A. Yes.  
 2 Q. Anything else that you can remember,  
 3 sitting here?  
 4 A. Of course, the contract itself and  
 5 then --  
 6 Q. What contract?  
 7 A. The purchase agreement. And, of  
 8 course, the loan docs later on.  
 9 Q. But as far as the financials related  
 10 to The Children's Center it's those three documents  
 11 that we talked about, two years of tax returns and  
 12 the profit and loss, the partial profit and loss?  
 13 A. And the statement from Mr. Arave.  
 14 Right now I don't recall any more. There may have  
 15 been some more, but I don't recall anything else at  
 16 this point.  
 17 Q. This paragraph 9 in Exhibit \*-052 --  
 18 A. Yes.  
 19 Q. -- talks about income and expense  
 20 statements for 2006. Did you ever see an income  
 21 and expense statement?  
 22 A. I had presumed that the profit and  
 23 loss was the income and expense.  
 24 Q. How about any aged receivables  
 25 reports?

1 closing you never reviewed a current balance sheet  
 2 for The Children's Center?  
 3 A. I've seen one since, after the  
 4 depositions.  
 5 Q. After the closing?  
 6 A. Yes.  
 7 Q. My question is prior to closing had  
 8 you seen --  
 9 A. No.  
 10 Q. -- any current balance sheet?  
 11 A. No.  
 12 Q. If it was called for -- did you ever  
 13 ask where is it before I sign this document or go  
 14 through with this deal, I want to see the current  
 15 balance sheet?  
 16 A. I don't recall asking for it.  
 17 Q. Paragraph B in Exhibit \*-052 says:  
 18 Satisfaction, slash, removal of inspection due  
 19 diligence contingencies. It says: No. 1, if buyer  
 20 does not within the strict time period specified  
 21 give to seller written notice of disapproved items,  
 22 buyer shall conclusively be deemed to have, A,  
 23 completed all inspections, investigations, review  
 24 of applicable documents and disclosures; B, elected  
 25 to proceed with the transaction; and, C, assumed

1 A. I did not see those.  
 2 Q. That was required, or at least that  
 3 was something that was requested, as part of your  
 4 doing your due diligence under this contract. Do  
 5 you remember seeing the aged receivables?  
 6 A. I don't remember seeing them.  
 7 Q. Do you remember asking for them, other  
 8 than what we see in paragraph 9?  
 9 A. I did not specifically ask for that.  
 10 Q. The last sentence says: 2005 and 2006  
 11 federal tax returns of tenant and a current balance  
 12 sheet showing assets and liabilities.  
 13 Did I read that correctly?  
 14 A. Yes.  
 15 Q. Did you ever review a current balance  
 16 sheet showing assets and liabilities of The  
 17 Children's Center?  
 18 A. We never got a balance sheet.  
 19 Q. You never received a balance sheet?  
 20 A. No.  
 21 Q. Do you know if Jeff Needs ever  
 22 received a balance sheet?  
 23 A. I don't believe he did. If he did, he  
 24 would have transferred it to me.  
 25 Q. And as you sit here today, prior to

1 all liability, responsibility, and expense for  
 2 repairs or corrections other than for items which  
 3 seller has otherwise agreed in writing to repair or  
 4 correct.  
 5 Did I read that correctly?  
 6 A. Yes.  
 7 Q. Paragraph 2 also says: If buyer does  
 8 within the strict time period specified give to  
 9 seller written notice of disapproved items, buyer  
 10 shall provide to seller pertinent sections of  
 11 written inspection reports. Seller shall have  
 12 three business days in which to respond in writing.  
 13 Did I read that correctly?  
 14 A. Yes.  
 15 Q. Going back up to paragraph B, did you  
 16 understand what that paragraph was saying when you  
 17 signed this agreement?  
 18 A. Yes.  
 19 Q. So you understood that even if you  
 20 didn't review the current balance sheet, you would  
 21 be deemed to have reviewed it and agree to carry on  
 22 in the transaction --  
 23 MR. CROCKETT: I'll object to the question  
 24 as calling for a legal conclusion on the part of  
 25 this witness.

1 Q. BY MR. ARMSTRONG: Your understanding.  
 2 A. Not necessarily.  
 3 Q. What's wrong with what I'm saying?  
 4 A. Sometimes when you're in negotiation  
 5 to purchase a property, sometimes you don't get  
 6 everything that you want. You compromise.  
 7 Q. So was it important to you in this  
 8 transaction to see a current balance sheet?  
 9 A. Not at that particular time. We felt  
 10 that we had adequate information to satisfy our  
 11 inquiries.  
 12 Q. Did you understand that under  
 13 paragraph B that you would be deemed to have --  
 14 that you assumed all liability and responsibility  
 15 related to not reviewing documents that you had the  
 16 right to review?  
 17 MR. CROCKETT: Clarification, Counsel. We  
 18 presume you mean on the date he signed the  
 19 agreement.  
 20 THE WITNESS: You mean the purchase  
 21 agreement?  
 22 Q. BY MR. ARMSTRONG: That's what we're  
 23 looking at right now, yes.  
 24 A. When I signed the purchase agreement,  
 25 yes. The answer is yes.

1 Q. Is there a reason why you -- why it  
 2 wasn't important to you then that you look at what  
 3 the current assets and liabilities are of the  
 4 company?  
 5 A. Because we had very strong evidence  
 6 otherwise that this was a strong operation and a  
 7 strong tenant and that the financials were strong.  
 8 Q. Very strong evidence. Give me that  
 9 very strong evidence.  
 10 A. The statement from Mr. Arave that  
 11 rents were paid, the estoppels were signed, that  
 12 the rents were current, that the tenant had been  
 13 there for a long time, that the tax returns were  
 14 strong, and we were convinced.  
 15 Q. You felt the tax returns were strong?  
 16 A. Yes.  
 17 Q. You felt that despite all of the  
 18 expenses that were showing up on the returns?  
 19 A. Yes.  
 20 Q. Did you have an accountant look at the  
 21 tax returns to give his or her opinion as to  
 22 whether this was a worthy company?  
 23 A. I don't recall doing that.  
 24 MR. CROCKETT: Counsel, can we take a  
 25 break?

1 MR. ARMSTRONG: I think now is a good time,  
 2 yeah. That's fine.  
 3 (A recess was taken from 11:18 a.m. to  
 4 11:27 a.m.)  
 5 Q. BY MR. ARMSTRONG: Back on the record.  
 6 Before the break we were talking about very strong  
 7 evidence that you considered to outweigh the need  
 8 to look at any balance sheet that would show assets  
 9 or liabilities of The Children's Center; is that  
 10 correct?  
 11 MR. CROCKETT: I'll object to the  
 12 misstatement of the testimony. Testimony stands  
 13 for itself. You don't need to repeat it, Counsel.  
 14 I object to the form of your question.  
 15 THE WITNESS: We had evidence to convince  
 16 us that it was a solid investment, yes.  
 17 Q. BY MR. ARMSTRONG: And that evidence  
 18 that you listed, the estoppels, the statement by  
 19 Gordon Arave, the tax returns, that evidence  
 20 obviated or somehow got rid of the need in your  
 21 mind to view a current balance sheet?  
 22 A. In addition to all of that there was  
 23 the representation from Jeff Needs, who was  
 24 familiar with Idaho and who got familiar with Idaho  
 25 Falls and this particular investment, who had been

1 in touch with Paul Fife, the seller's broker. And  
 2 everything that Paul Fife was communicating to Jeff  
 3 Needs and, in return, everything from Jeff Needs  
 4 indicated this was a very good investment.  
 5 And then Jeff Needs and I did our own  
 6 physical inspection of the building and the place  
 7 at one particular point in time. And we were also  
 8 convinced from that visit that it was a good  
 9 investment. And we had inquired with others who --  
 10 we had spoken with others about the investment, and  
 11 we were told that indeed it was a very good  
 12 investment.  
 13 Q. Who else did you talk to about the  
 14 investment other than Jeff Needs?  
 15 A. We -- in our visit to Idaho Falls we  
 16 ran into a gentleman called Louis Kraml, I believe,  
 17 who was the CEO of the local hospital here, who  
 18 assured us that indeed this was a great business to  
 19 be in in Idaho Falls. It was the only one of its  
 20 kind and that there was a strong financial backing  
 21 for it.  
 22 Q. Was that prior to closing, your  
 23 meeting with Louis Kraml?  
 24 A. Yes.  
 25 Q. You met with Louis Kraml prior to

DEPOSITION OF THOMAS O'SHEA - 05/12/09

SHEET 18 PAGE 69

1 A. Yes.  
2 Q. -- prior to closing?  
3 A. Yes.  
4 Q. Do you remember when that was?  
5 A. October or November of '07.  
6 Q. Was there snow on the ground?  
7 A. No.  
8 Q. Did you fly in, drive in from Boise?  
9 How did that work?  
10 A. Flew into Boise, drove up.  
11 Q. Did you drive with Jeff Needs?  
12 A. I believe so.  
13 Q. Did you talk about the transaction  
14 during your drive?  
15 A. Among other things, I'm sure I did.  
16 Q. What did you do when you got to Idaho  
17 Falls on that particular trip?  
18 A. I take it back. I take it back. I  
19 didn't drive up with Jeff Needs. On second -- I  
20 now recall I flew into Salt Lake City and drove up  
21 here and met Jeff Needs here in Ammon. And he had  
22 bumped into Louis Kraml at the time, and then when  
23 I arrived, he introduced me to Louis Kraml.  
24 Q. So is that the meeting that you had at  
25 the coffee shop?

PAGE 70

1 A. Yes.  
2 Q. So there was a scheduled time to meet  
3 with Louis Kraml at the coffee shot?  
4 A. No, there wasn't. He had bumped into  
5 him, I believe.  
6 Q. He had already bumped into him in the  
7 coffee shop?  
8 A. Yes.  
9 Q. You were already en route to Idaho  
10 Falls?  
11 A. Yes.  
12 Q. Jeff Needs said he had stopped by this  
13 coffee shop and said I have somebody I want you to  
14 meet?  
15 A. No, he didn't say that. He said I  
16 want to meet you at the coffee shop.  
17 Q. And that's when you talked with Louis  
18 Kraml?  
19 A. That's right.  
20 Q. Tell me what you did when you visited  
21 the property during this visit to Idaho Falls, the  
22 1675 property.  
23 A. We walked -- we drove around the  
24 neighborhood in general.  
25 Q. You and Jeff Needs?

673

PAGE 71

1 A. Yes.  
2 Q. Was anyone else with you?  
3 A. No.  
4 Q. Okay. Continue.  
5 A. And then we drove around the property  
6 and looked at the building, the physical building  
7 itself, the night before. The following morning we  
8 visited Paul Fife's office. We had wanted to meet  
9 Mr. Smith, who was in charge of The Children's  
10 Center. We were told not to.  
11 Q. Who told you?  
12 A. Mr. Fife, Paul Fife.  
13 Q. Did he tell you not to talk with him?  
14 A. Not to interrupt him.  
15 Q. Not to interrupt him. I think  
16 Mr. Needs testified that the suggestion was they  
17 didn't want the operations being interrupted with  
18 the children that were there. Do you remember  
19 that?  
20 A. That was the impression they gave us,  
21 that we were intruders and outsiders, and be  
22 careful not to interrupt the operation.  
23 Q. Who gave you that impression?  
24 A. Paul Fife.  
25 Q. Did Matt Smith give you that

PAGE 72

1 impression?  
2 A. We did not meet Matt Smith. I asked  
3 to meet Matt Smith. We went to the secretary's  
4 office and asked if Matt Smith was there anyway.  
5 Q. Was Paul Fife with you?  
6 A. I'm not sure about that now.  
7 Q. Jeff Needs was with you?  
8 A. Jeff Needs was with me.  
9 Q. Anybody else that was with you?  
10 A. No.  
11 Q. Tell me what happened when you went to  
12 the secretary to ask to meet Matt Smith.  
13 A. I asked if we could meet with Matt  
14 Smith, if he was in, and we were told that he  
15 wasn't.  
16 Q. And then what did you do?  
17 A. We introduced ourselves. And we asked  
18 if we could walk around in general, and we were  
19 told we could, and we did.  
20 Q. Did you walk around the entire  
21 property inside?  
22 A. We did, yes.  
23 Q. Did anybody accompany you and  
24 Mr. Needs while you did that?  
25 A. I don't recall there was anyone

1 accompanying us.  
 2 Q. Was Mr. Weinpel there?  
 3 A. We may have seen him in his office,  
 4 but we didn't speak with him.  
 5 Q. You didn't speak with Matt Smith?  
 6 A. We asked to meet with him, but we were  
 7 told that he wasn't there. And Mr. Fife told us  
 8 previously not to speak with him.  
 9 Q. Why did Paul Fife tell you not to  
 10 speak with Matt Smith?  
 11 A. The impression he gave was that we  
 12 would disrupt his operations.  
 13 Q. Did that concern you at all when Paul  
 14 Fife said that to you?  
 15 A. Not too much. Not too much.  
 16 Q. So it did have some concern to you?  
 17 A. I was wondering why, why Matt Smith  
 18 would be so busy as not to meet us.  
 19 Q. Any other thoughts that came to your  
 20 mind?  
 21 A. At the time, no. At the time, no.  
 22 Q. How about later?  
 23 A. After the close?  
 24 Q. Just at any time.  
 25 A. I've asked to see Matt Smith several

1 times, and he's refused to meet with me.  
 2 Q. Do you know why?  
 3 A. I have no idea.  
 4 Q. Did you try to meet with Matt Smith at  
 5 any other time other than during this visit to the  
 6 property prior to closing?  
 7 A. Yes -- prior to closing. No. I'm  
 8 sorry.  
 9 Q. So after this visit to Idaho Falls or  
 10 Ammon to see the property and to meet with Matt  
 11 Smith and you were told that he wasn't around to  
 12 meet with you, there was no other time that you  
 13 sought to meet with Matt Smith prior to closing?  
 14 A. Not with Matt Smith personally, no.  
 15 Q. Okay. How about with anybody else  
 16 associated with The Children's Center prior to  
 17 closing?  
 18 A. Other than my visit there was no other  
 19 time. I only made one visit.  
 20 Q. Okay. Did you think that it was  
 21 important to meet with somebody at The Children's  
 22 Center prior to closing?  
 23 A. I didn't consider it super important,  
 24 no.  
 25 Q. How about just important?

674

1 A. Semi-important.  
 2 Q. So you considered it semi-important?  
 3 A. Yes.  
 4 Q. Is there a reason why you didn't  
 5 pursue another meeting with Matt Smith?  
 6 A. No. The reason I would like to meet  
 7 him is you get general impressions about the  
 8 operations, but -- because I was considering him to  
 9 be my future tenant at the time, and I would just  
 10 like to say hello and shake his hand. But I was  
 11 satisfied that the business was sound, and there  
 12 was no immediate urgency for me to.  
 13 Q. But you felt it was important to meet  
 14 him prior to closing?  
 15 A. Important enough to say hello and to  
 16 get some general impressions, yeah, of his  
 17 operations. Ask him some questions too maybe.  
 18 Q. Ask him questions. What kind of  
 19 questions did you think you would have asked him  
 20 had you met with him?  
 21 A. General questions about how long he's  
 22 been in business and how his operation was doing  
 23 and how he saw the future of the operation.  
 24 Q. Did my clients -- did Gordon Arave  
 25 ever preclude you from meeting with Matt Smith?

1 A. I had no dealings with Mr. Arave prior  
 2 to the close of the property, direct dealings.  
 3 Q. Did Paul Fife ever prevent you from  
 4 contacting and talking with Matt Smith?  
 5 A. He told us not to contact him.  
 6 Q. During that first visit, correct?  
 7 A. Yes.  
 8 Q. Did he tell you not to contact him  
 9 ever?  
 10 A. He gave Jeff Needs the impression and  
 11 Jeff Needs gave me the impression that we should  
 12 not be too intrusive in our due diligence.  
 13 Q. But did you consider meeting with Matt  
 14 Smith just to get your general sense of an  
 15 impression of the business, to ask him questions --  
 16 A. When I --  
 17 Q. Let me finish my question. Did you  
 18 consider that to be intrusive?  
 19 A. No. I didn't consider it to be  
 20 intrusive.  
 21 Q. So, again, did Paul Fife -- other than  
 22 what he told you about meeting with Matt Smith  
 23 during that first visit to the property and other  
 24 than the impression that you got from Jeff Needs  
 25 that you weren't to be too intrusive, did Paul Fife

1 prevent you from meeting with Matt Smith?  
 2 A. It's a free world, I guess, and one  
 3 could insist on seeing Matt Smith if Matt Smith  
 4 were so disposed.  
 5 Q. So the answer to my question is no,  
 6 Paul Fife did not?  
 7 MR. CROCKETT: You need to give him a  
 8 chance to finish.  
 9 THE WITNESS: Please. Yes. We respected  
 10 the wishes of Paul Fife, and we felt that Paul Fife  
 11 was representing the seller. We respected the  
 12 wishes of the seller.  
 13 Q. BY MR. ARMSTRONG: But you were buying  
 14 the property. You were going to be taking --  
 15 A. Yes.  
 16 Q. -- over as the landlord of this  
 17 particular tenant?  
 18 A. Yes.  
 19 Q. Did Paul Fife prevent you from  
 20 conducting that due diligence as far as meeting  
 21 with the tenant?  
 22 A. In some way, yes. In some way, yes.  
 23 Q. And in what way was that?  
 24 A. By putting -- by persuading us to not  
 25 see Matt Smith during the course of our visit. And

1 A. Yes. That's what it says.  
 2 Q. And if you'd turn to page 18 of this  
 3 document.  
 4 A. They're not numbered, I don't believe.  
 5 Q. Down at the bottom after first amended  
 6 verified complaint. Sorry. You're going further.  
 7 Do you want me to help you out there. There you  
 8 go. Is that your signature on the verification  
 9 page?  
 10 A. Yes.  
 11 Q. And that was signed by you September  
 12 30th, 2008?  
 13 A. Yes.  
 14 Q. And you're stating there that you've  
 15 read the above and foregoing first amended verified  
 16 complaint, know its contents, and you believe the  
 17 facts to be true as stated in the complaint,  
 18 correct?  
 19 A. Yes.  
 20 Q. If you'll turn to page 3 of the  
 21 complaint, paragraph 7, it says: Some advertising  
 22 and promotion of the subject property was published  
 23 and disseminated by Paul Fife, defendants'  
 24 exclusive real estate listing and selling agent,  
 25 including, but not limited to, a LoopNet listing, a

1 we respected his wishes.  
 2 Q. But nothing prevented you after that  
 3 from sending an e-mail to Matt, calling Marc  
 4 Weinpel, talking with anybody that was affiliated  
 5 with The Children's Center?  
 6 A. No, he didn't prevent us from doing  
 7 that.  
 8 Q. How about Ben Arave?  
 9 A. I had no contact with Ben Arave.  
 10 Q. How about Jared Arave?  
 11 A. I had no contact with Jared Arave.  
 12 Q. Anybody else that you understood to be  
 13 representing the seller, did any of those people  
 14 prevent you from meeting with The Children's Center  
 15 or anybody associated with The Children's Center?  
 16 A. No.  
 17 MR. ARMSTRONG: Handing you what we're  
 18 going to mark as Exhibit \*-058.  
 19 (Exhibit \*-058 marked.)  
 20 Q. BY MR. ARMSTRONG: We're marking this  
 21 as Exhibit \*-058 to your deposition. Do you  
 22 recognize this document?  
 23 A. Yes.  
 24 Q. This is the first amended verified  
 25 complaint in this case, correct?

1 copy of which is attached hereto as Exhibit A and  
 2 made a part thereof by this reference.  
 3 If you'll look at Exhibit A. It's one  
 4 page after your verification page.  
 5 A. You may have to help me here.  
 6 MR. CROCKETT: You're going too far. These  
 7 are the exhibits, and it's right after -- it's  
 8 right there.  
 9 THE WITNESS: I got it. Yes.  
 10 Q. BY MR. ARMSTRONG: When was the first  
 11 time that you saw this LoopNet advertisement?  
 12 A. Again, in the fall of '07. I can't  
 13 tell you a specific date.  
 14 Q. Did you show this to the other  
 15 investors?  
 16 A. I may have. I know -- I'm sure I  
 17 showed it to my wife and probably to the Donahues.  
 18 I may have shown it to Chillemi and Caleb, but I'm  
 19 not certain of that.  
 20 Q. Do you usually rely on this kind of an  
 21 advertisement in entering into a purchase and sale  
 22 agreement, or do you view this as more of an  
 23 enticement to look at the property a little  
 24 further?  
 25 A. A LoopNet advertising and listing?

SHEET 21 PAGE 81

1 **Q. Correct.**  
 2 A. I take it seriously. I rely on it but  
 3 not exclusively.  
 4 **Q. You feel like you need to do some due**  
 5 **diligence, poke around a little and see if what is**  
 6 **represented there is true or not?**  
 7 A. Yes.  
 8 **Q. At the time that you saw this**  
 9 **document, did you know what a cap rate is?**  
 10 A. I have an idea what a cap rate is, but  
 11 I'm not an expert on --  
 12 **Q. What is your idea of a cap rate?**  
 13 A. I know that the higher the cap rate  
 14 the cheaper the building, the better the value for  
 15 the buyer.  
 16 **Q. So it fluctuates?**  
 17 A. It fluctuates.  
 18 **Q. Did you understand that that is really**  
 19 **kind of a subjective representation of the**  
 20 **investment value of a property?**  
 21 MR. CROCKETT: I'll object to the form of  
 22 the question as calling for a conclusion as to  
 23 whether it's subjective.  
 24 THE WITNESS: I realize the cap rate  
 25 fluctuates from location to location, from building

PAGE 83

1 the property.  
 2 MR. ARMSTRONG: That wasn't my question.  
 3 Let's have Madam Court Reporter read back my  
 4 question. If you can just listen to my question  
 5 and answer it.  
 6 (The record was read.)  
 7 MR. CROCKETT: I'll object to the form of  
 8 the question.  
 9 THE WITNESS: What's the question?  
 10 **Q. BY MR. ARMSTRONG: She just read it to**  
 11 **you. Do you want her to read it again?**  
 12 A. No. But I thought it was a statement  
 13 more than a question.  
 14 **Q. Do you agree with that statement?**  
 15 A. No, I don't agree with that statement.  
 16 **Q. How is that statement wrong?**  
 17 A. In the characterization of puffing and  
 18 enticement.  
 19 **Q. You don't think advertising is a form**  
 20 **of sales puffery?**  
 21 A. There is a degree to it, but there is  
 22 more also. It's not exclusively puffery.  
 23 **Q. But it's in part puffery?**  
 24 MR. CROCKETT: I'll object to the form of  
 25 the question. He stated he doesn't believe it to

PAGE 82

1 to building, from place to place. If that's  
 2 subjective, I guess so. But otherwise --  
 3 **Q. BY MR. ARMSTRONG: Mr. Butikofer**  
 4 **testified yesterday that this is essentially a**  
 5 **subjective way of representing the intention of a**  
 6 **seller and how motivated they are to sell their**  
 7 **property. Do you understand that to be the case**  
 8 **with a cap rate?**  
 9 A. Yes. I know that the seller generated  
 10 documents like this and that he -- everything in it  
 11 is subjective to the seller, I guess. The seller  
 12 is the one who --  
 13 **Q. Okay. So this really is kind of an**  
 14 **enticement or advertisement, puffing, if you will,**  
 15 **in order to attract potential --**  
 16 MR. CROCKETT: Object.  
 17 MR. ARMSTRONG: Let me finish my question,  
 18 Counsel.  
 19 **Q. BY MR. ARMSTRONG: -- to attract**  
 20 **potential buyers to the property?**  
 21 MR. CROCKETT: I'll object to the form of  
 22 the question.  
 23 THE WITNESS: I also realize that sellers  
 24 are obligated by their -- truth in order to  
 25 describe their figures and their descriptions of

PAGE 84

1 be puffery.  
 2 MR. ARMSTRONG: I'm going to object to your  
 3 mischaracterization and your speaking objection.  
 4 He testified that in part it is sales puffery.  
 5 MR. CROCKETT: Object anyway.  
 6 MR. ARMSTRONG: I would like to know what  
 7 part he considers to be puffery.  
 8 MR. CROCKETT: He said he didn't think it  
 9 was puffery.  
 10 THE WITNESS: These are factual  
 11 characterizations of a building. It describes the  
 12 square footage. It describes the price. It  
 13 describes the square footage price. It describes  
 14 the location, and that is not puffery.  
 15 **Q. BY MR. ARMSTRONG: Fair enough. You**  
 16 **were running your finger down the right side --**  
 17 A. Yes.  
 18 **Q. -- of those factual highlights of the**  
 19 **property?**  
 20 A. Yes.  
 21 **Q. When your finger comes down to the cap**  
 22 **rate of 8 percent --**  
 23 A. Yes.  
 24 **Q. -- do you think that the 8 percent is**  
 25 **puffery insofar as this document is concerned?**

676

1 an individual or as owner of an LLC.  
2 **Q. Gordon Arave is the landlord with The**  
3 **Children's Center; is that what you understand?**  
4 A. That he was the landlord at the time.  
5 **Q. What do you base that on?**  
6 A. That he was the owner of the building.  
7 **Q. Okay. He's the owner. What do you**  
8 **base that on? Did you see a deed that was deeded**  
9 **to Gordon Arave personally?**  
10 A. That he was the seller of the  
11 building. Jeff Needs -- I relied on the  
12 representation of Jeff Needs, who told me that  
13 Gordon -- that Gordon Arave was selling this  
14 building. And I did not know at the time whether  
15 Gordon Arave had an LLC or two LLCs or three LLCs  
16 or High Mark Development or any of those.  
17 **Q. But let me just understand what you're**  
18 **saying. That's what you're basing your testimony**  
19 **on in saying that Gordon Arave and High Mark are**  
20 **one and the same, you're getting that understanding**  
21 **from what you've been told by Jeff Needs?**  
22 A. At the time. At the time that this  
23 estoppel was signed and written, we understood the  
24 landlord to be Gordon Arave.  
25 **Q. At the time that this lease estoppel**

1 **Q. Where was that meeting?**  
2 A. It was at the -- Paul Fife's office.  
3 **Q. And who was in that meeting?**  
4 A. Gordon Arave -- Arave. I'm sorry if I  
5 am pronouncing your name --  
6 GORDON ARAVE: Arave.  
7 THE WITNESS: Gordon Arave; Louis Kraml,  
8 and one or two of his associates, Kraml's  
9 associates; Paul Fife; Jeff Needs; myself; and I  
10 don't recall if there was anybody else.  
11 **Q. BY MR. ARMSTRONG: That was a January**  
12 **2008 meeting?**  
13 A. Yes.  
14 **Q. And give me your fullest recollection**  
15 **of what was said with regard to the option being**  
16 **released?**  
17 A. At the meeting?  
18 **Q. Yes.**  
19 A. We didn't ask about the option  
20 specifically at that meeting. We asked -- I asked  
21 Mr. Arave, however, if there was any consideration  
22 made due to the fact -- I asked him first if rent  
23 had been paid in December and in November, and he  
24 said rent had been paid every month up to that  
25 time.

1 certificate was signed you understood that Gordon  
2 Arave was the landlord?  
3 A. Yes. Whether it's High Mark  
4 Development or Gordon Arave was not that important  
5 in our estimation.  
6 **Q. It wasn't important to you who the**  
7 **actually seller was?**  
8 A. We figured they were one and the same.  
9 **Q. Wasn't it important to you to find out**  
10 **what the financial ability was of the seller in**  
11 **case they had to indemnify you on the option that**  
12 **The Children's Center had to buy the property?**  
13 A. Yes. But the indemnification was a  
14 nonissue when this certificate was signed.  
15 **Q. Because that option had been released?**  
16 A. Yes.  
17 **Q. And this document discloses to you**  
18 **that an agreement has been reached that released**  
19 **that option, correct?**  
20 A. Yes.  
21 **Q. Did you inquire of anyone as to what**  
22 **the consideration was for releasing that option?**  
23 A. I asked Gordon Arave himself in  
24 January of '08 was there consideration made. And  
25 he told me there wasn't.

1 And I was told that tenant had not  
2 paid rent in December, so I specifically asked  
3 Mr. Arave if the tenant had paid rent in December.  
4 And Mr. Arave's response was no, rent was not paid  
5 in December because I was out of town, and when I  
6 came back, I was surprised because rent had always  
7 been paid, and so I kicked in the rent myself. And  
8 I asked him if he had paid any consideration to the  
9 tenant, and he said no.  
10 **Q. Any consideration paid to the tenant**  
11 **for release of the option to purchase?**  
12 A. That's right. Yes.  
13 **Q. Anything else said about the option?**  
14 A. I believe that was all that was said  
15 about the option.  
16 **Q. Okay. Prior to closing did you talk**  
17 **to anybody about what was given in exchange for the**  
18 **release of these options or of this option in**  
19 **particular?**  
20 A. No. I may have discussed it with Jeff  
21 Needs when Jeff Needs informed me that the option  
22 was released.  
23 **Q. Did Jeff Needs inform you, or did you**  
24 **get that from this document, this lease estoppel,**  
25 **this Exhibit \*-022?**



DEPOSITION OF THOMAS O'SHEA - 05/12/09

SHEET 26 PAGE 101

1 A. I believe Jeff Needs informed me  
2 first.  
3 Q. Okay.  
4 A. Over the phone.  
5 Q. And it's your testimony that you may  
6 have inquired of Jeff as to what was given in  
7 exchange for the release of that option?  
8 A. No. I don't think I inquired as such.  
9 But I may have asked, well, why did they do that.  
10 Q. And did Jeff respond?  
11 A. I think he said that they wanted to  
12 close the deal. The seller wanted to close the  
13 deal.  
14 Q. So Jeff said the reason it was  
15 released was because the seller wanted to close the  
16 deal?  
17 A. Yes.  
18 Q. Anything else said?  
19 A. I don't recall anything else.  
20 Q. Did you follow up to find out, well,  
21 what does that mean? What was given in exchange?  
22 A. No. We didn't find -- we didn't  
23 follow up anymore. It was good for us that the  
24 option was released.  
25 Q. In fact, it was a critical aspect of

PAGE 102

1 this transaction, wasn't it?  
2 A. One of them.  
3 Q. In fact, it was so critical that my  
4 client offered to indemnify you against that option  
5 in the event the option was exercised. Do you  
6 remember that?  
7 A. Yes. But there was some discussion --  
8 there were more discussions than just the  
9 indemnification.  
10 Q. What do you mean by that? Discussions  
11 about other aspects of the deal?  
12 A. Yes.  
13 Q. Like what?  
14 A. Like the nature of the triple net --  
15 definition of the triple net concept. There was  
16 some ambiguity around the triple net.  
17 Q. Ambiguity from the lease agreement?  
18 A. Yes.  
19 Q. Anything else?  
20 A. I don't recall anything else at the  
21 time. We had some prior discussions about other  
22 things, about maybe Mr. Arave assuming a note for  
23 us, and he would not be willing to do that. And  
24 there were some negotiations that had gone back and  
25 forth prior through the brokers. It wasn't just

PAGE 103

1 the indemnification. There were several other  
2 issues we tried to negotiate back and forth.  
3 Q. The indemnification was an issue that  
4 you felt was ambiguous how the option was exercised  
5 or how the property was valued?  
6 A. Yes.  
7 Q. Pursuant to an option being exercised,  
8 did you consider that to be a pretty critical  
9 aspect?  
10 A. One of them, yes.  
11 Q. Did any other investors voice your  
12 same concerns?  
13 A. I think we were all in agreement that  
14 this was an option that was not feasible. It was  
15 not acceptable to us.  
16 Q. So you wanted it released or somehow  
17 contracted around through indemnification?  
18 A. Or else clarified with more specific  
19 detail.  
20 Q. Let's go to tab 1. This will be  
21 Exhibit \*-001 to your deposition. And we'll get  
22 back to the estoppel certificate at tab 22.  
23 GORDON ARAVE: Rick, is it possible to take  
24 a break.  
25 MR. ARMSTRONG: Off the record.

PAGE 104

1 (A recess was taken from 12:16 p.m. to  
2 1:29 p.m.)  
3 (Mr. Arave left the deposition.)  
4 Q. BY MR. ARMSTRONG: Back on the record.  
5 Before the lunch break we were talking about the  
6 complaint in this case that you have filed against  
7 my clients and some of the claims for relief.  
8 You've got the complaint in front of you, and we've  
9 marked that as Exhibit \*-058 to your deposition.  
10 If you'll turn back to page 10.  
11 A. Okay.  
12 Q. If you look at paragraph 33, you  
13 allege: Defendants, either individually or through  
14 their agents, materially breached the commercial  
15 purchase and sale agreement by negligently and/or  
16 fraudulently misrepresenting in the lease estoppel  
17 certificate that all minimum monthly rent had been  
18 paid to the end of September 2007 and that The  
19 Children's Center was current in the payment of  
20 taxes, utilities, or other charges required to be  
21 paid.  
22 Did I read that correctly?  
23 A. Yes.  
24 Q. And, in fact, the rent had been paid  
25 to the end of September 2007. Is that your

SHEET 31 PAGE 121

1 this as Exhibit \*-014 to your deposition, this is  
 2 the estoppel certificate that we sent to you  
 3 September 27th, signed by Matt Smith, correct?  
 4 A. Yes.  
 5 Q. He signed that September 28th?  
 6 A. Yes.  
 7 Q. And hence Jeff Needs' letter of  
 8 October 2nd saying the estoppel is still not  
 9 acceptable to the buyer?  
 10 A. Yes.  
 11 Q. And you continue to state that the  
 12 tenant has to acknowledge that management fees and  
 13 insurance costs of landlord are part of the triple  
 14 net portion of this lease. That's what this letter  
 15 says, correct?  
 16 A. Yes.  
 17 Q. Also the tenant has to agree that the  
 18 MAI appraisal is an agreed-upon appraisal by both  
 19 parties?  
 20 A. Yes.  
 21 Q. Even though there was a difference of  
 22 opinion on the part of the tenant as to whether  
 23 that was in the lease or not?  
 24 A. Correct.  
 25 Q. So you would agree there was a

PAGE 123

1 A. I believe it's a letter from Jeff  
 2 Needs to Paul Fife.  
 3 Q. And it's dated October 12th, 2007?  
 4 A. October 12th.  
 5 Q. This says: As discussed, one of the  
 6 parties that agreed to partner with Tom O'Shea  
 7 pulled out.  
 8 Did I read that correctly?  
 9 A. Yes.  
 10 Q. Which partner had decided to pull out?  
 11 A. None of the present partners. It was  
 12 another partner that was going to invest with us.  
 13 Q. Who was that?  
 14 A. The name was Johnson family.  
 15 Q. Johnson family. Is it a trust?  
 16 A. No.  
 17 Q. Was it --  
 18 A. Mr. and Mrs. Johnson.  
 19 Q. What is Mr. Johnson's first name?  
 20 A. Laura and -- Laura is her name.  
 21 Q. Laura Johnson. And what is his name?  
 22 A. Senior moment here. I forget.  
 23 Q. What is Laura Johnson's phone number?  
 24 A. Her phone number -- I don't know that.  
 25 Q. Do you have a way of finding out?

PAGE 122

1 difference of opinion as to what the lease called  
 2 for vis-a-vis triple net aspects as well as with  
 3 the option, correct?  
 4 A. We felt there were too many  
 5 ambiguities that could cause problems down the  
 6 road.  
 7 Q. So the answer to my question is you  
 8 felt there was a difference of opinion?  
 9 A. You could characterize it that way.  
 10 Q. So it's a fair characterization?  
 11 A. It's a fair characterization.  
 12 Q. So at least during this process of  
 13 negotiating an estoppel certificate, this option  
 14 was a real concern for you, how to contract around  
 15 it, for instance, how to deal with it?  
 16 A. Yes, that was.  
 17 Q. As well as how this triple net lease  
 18 was defined?  
 19 A. Yes.  
 20 Q. And what was required as part of the  
 21 triple net aspect?  
 22 A. Yes.  
 23 Q. Turn to tab 2, please. What is this  
 24 document? We'll mark this as Exhibit \*-002 to your  
 25 deposition. What is this document?

PAGE 124

1 A. I could call my wife and find out.  
 2 Q. Okay. How about her address, Laura  
 3 Johnson's address?  
 4 A. He lives in Montclair, in Oakland. I  
 5 don't have the house address. I believe it's  
 6 Caldwell Street.  
 7 Q. Why did she and her husband pull out  
 8 of this deal?  
 9 A. I'm not sure of the reason. They were  
 10 concerned about the option to buy. They stated  
 11 that, but I'm not sure if that's the actual reason  
 12 they pulled out.  
 13 Q. Were you party to discussions with  
 14 Laura Johnson and her husband about their concerns  
 15 about the option to buy?  
 16 A. Yes.  
 17 Q. How many discussions did you have with  
 18 them?  
 19 A. Probably one, I would think.  
 20 Q. Where was that discussion?  
 21 A. I'm not sure whether it was in my home  
 22 or over the phone.  
 23 Q. Is the Johnson family, are they family  
 24 members of yours or Anne's?  
 25 A. No. They're friends.

DEPOSITION OF THOMAS O'SHEA - 05/12/09

SHEET 34 PAGE 133

1 Q. There was some forbearance?  
 2 A. There was forbearance, and there was  
 3 some modifications made.  
 4 Q. And to modify that, it wasn't  
 5 refinanced?  
 6 A. Maybe they -- maybe the technical term  
 7 is refinancing.  
 8 Q. Was there an appraisal done in  
 9 connection with that refinancing?  
 10 A. StanCorp may have done an appraisal.  
 11 We didn't call for an appraisal, nor did I see the  
 12 appraisal.  
 13 Q. StanCorp may have done the appraisal.  
 14 Did you see an appraisal?  
 15 A. I didn't see the appraisal.  
 16 Q. Have you asked anybody of late to come  
 17 in and conduct an appraisal of the property --  
 18 A. No.  
 19 Q. -- for purposes of this case?  
 20 A. No.  
 21 Q. So you don't intend on calling an  
 22 appraiser to be a witness in this case to testify  
 23 about the value of the property?  
 24 A. We may do that.  
 25 Q. Okay. But you've not done so?

PAGE 134

1 A. We have not done so.  
 2 Q. At least at this point?  
 3 A. No.  
 4 Q. Going back to tab 3. We haven't  
 5 looked at tab 3 yet. Can you identify that as one  
 6 of the estoppel certificates that was not  
 7 acceptable to you and your investors?  
 8 A. Yes, I recall this.  
 9 Q. So this was one of the various  
 10 estoppels that had been negotiated, signed, and  
 11 then rejected by -- between the parties?  
 12 A. Yes.  
 13 Q. Okay. Did you ever meet Dale  
 14 Schneider, the signer on this document?  
 15 A. Yes.  
 16 Q. You met him before closing?  
 17 A. No. I had seen him in his office. I  
 18 didn't recognize who he was.  
 19 Q. You saw him during your physical  
 20 inspection --  
 21 A. Yes.  
 22 Q. -- of the property prior to closing?  
 23 A. Yes.  
 24 Q. You didn't talk to him?  
 25 A. I said hello.

680

PAGE 135

1 Q. What did he say in return?  
 2 A. He said hello.  
 3 Q. Didn't have any discussions  
 4 substantively?  
 5 A. No.  
 6 Q. But you knew that Dale Schneider was  
 7 an employee of The Children's Center?  
 8 A. At what point?  
 9 Q. Before closing.  
 10 A. I believe I did.  
 11 Q. If you'll turn to tab 4. Do you  
 12 recognize this document?  
 13 A. Yes.  
 14 Q. What is it?  
 15 A. It's a description of cam charges and  
 16 expenses through December of '07 done by Mr. Arave.  
 17 Q. Is this something that you had in your  
 18 possession and that you reviewed prior to the  
 19 closing on the property?  
 20 A. I think I've seen a different document  
 21 to this.  
 22 Q. So did you see this document prior to  
 23 closing?  
 24 A. I believe I did.  
 25 Q. Was this similar to what you had seen

PAGE 136

1 and what you had referred to earlier in your  
 2 testimony about a statement from Gordon Arave?  
 3 A. Something similar but not the same.  
 4 Q. Did you ever compare those two side by  
 5 side?  
 6 A. No, I did not.  
 7 Q. Do you know if Jeff Needs did?  
 8 A. I do not know that.  
 9 Q. In the middle of the page it says:  
 10 Note, this accounts for all costs through 12-31-07.  
 11 We will collect the rent for December, credit back  
 12 the balance owed to the new owner based on the date  
 13 of closing. We will work out the deficit balances  
 14 with The Children's Center on the cam charges  
 15 through 2007.  
 16 This says that there is a deficit  
 17 balance with The Children's Center on cam charges,  
 18 does it not?  
 19 A. It says that here. I don't recall  
 20 seeing that before closing though.  
 21 Q. It says: We will collect the rent for  
 22 December, credit back the balance owed to the new  
 23 owner based on the date of closing.  
 24 You were credited with your -- the  
 25 benefit of rent from the date of closing through

1 an estoppel to be?  
 2 A. It's essentially -- it's an assurance  
 3 and a guarantee, verbal written guarantee, signed  
 4 by the tenant and hopefully signed -- known by the  
 5 owner, The Center, that the rent is indeed accurate  
 6 and that the terms, the substantive terms, of the  
 7 lease are accurate.  
 8 Q. Do you understand that an -- do you  
 9 know what the word estoppel means?  
 10 A. Yes. To prevent or to stop from.  
 11 Q. So do you understand an estoppel to  
 12 mean if the tenant signs it, the tenant can't come  
 13 back six months later and say something that would  
 14 conflict with what they sign in the estoppel  
 15 certificate?  
 16 A. There are very few guarantees in life.  
 17 Q. Well, do you understand that that's  
 18 what the purpose of the estoppel is?  
 19 A. I understand, yes.  
 20 Q. That's your understanding of what an  
 21 estoppel is?  
 22 A. Yes.  
 23 MR. CROCKETT: Counsel, he explained his  
 24 understanding. I'm sure his explanation was a  
 25 little broader than your representation.

1 Q. BY MR. ARMSTRONG: Turn to tab 42,  
 2 please. This is from Kristoffer Lynds to Jeff  
 3 Needs; you're copied on it. It's dated August 9,  
 4 2007. Is Kristoffer Lynds the same person, the  
 5 mutual friend --  
 6 A. Yes.  
 7 Q. -- that introduced you to Jeff Needs?  
 8 A. Yes.  
 9 Q. He says here: Jeff, I think -- looks  
 10 like a very nice property.  
 11 Is he referring to the 1675 property?  
 12 A. Yes.  
 13 Q. If truly triple N, this would be a  
 14 great exchange property. I would want to make sure  
 15 you put in your purchase and sale you get financial  
 16 on the tenant?  
 17 A. Yes.  
 18 Q. Is the reason the requested financial  
 19 information that is in the real estate purchase  
 20 agreement, the tax returns, the aged receivables,  
 21 the income and expense report, and the balance  
 22 sheet, were those things included in the purchase  
 23 agreement because of Kristoffer Lynds' suggestion?  
 24 A. No.  
 25 Q. Why were they included? Who suggested

1 it?  
 2 A. He himself. Who suggested this  
 3 e-mail?  
 4 Q. No. Who suggested that those  
 5 financial documents be included in the information  
 6 you wanted?  
 7 A. In the purchase agreement?  
 8 Q. In the purchase agreement.  
 9 A. Jeff Needs, I believe.  
 10 Q. Do you know if he included that  
 11 language in the purchase agreement because of what  
 12 Kristoffer Lynds had said?  
 13 A. No, I don't believe so.  
 14 Q. Go to tab 44. This is an e-mail from  
 15 Jeff Needs to Paul Fife, dated January 25, 2008.  
 16 It says: Paul, can you confirm for me that Gordon  
 17 received rent from The Children's Center in  
 18 December and where or who you received the tax  
 19 returns and financial statements from.  
 20 Did I read that correctly?  
 21 A. Yes.  
 22 Q. When did The Children's Center abandon  
 23 the property?  
 24 A. I believe they abandoned it in March  
 25 of '08.

1 Q. How were you notified of that fact?  
 2 A. We -- they had not paid rent in  
 3 January or February, so then we gave them notice to  
 4 quit or pay rent. And I believe Jeff Needs found  
 5 out that they had left the property.  
 6 Q. How did he find that out, do you know?  
 7 A. I'm not sure. I believe he was in  
 8 contact with somebody here in Idaho Falls.  
 9 Q. Okay. What did you do at that point  
 10 once you found out they had abandoned the property?  
 11 A. We told Jeff Needs to make sure to  
 12 secure the building and that it was safe and locked  
 13 and cleaned. And I told him to immediately start  
 14 advertising it to re-rent it.  
 15 Q. Okay. Do you know when you gave that  
 16 instruction to Jeff?  
 17 A. Around the time -- around the  
 18 beginning of March, I believe, or thereabouts.  
 19 Q. Did Jeff tell you at that time that he  
 20 would start looking?  
 21 A. Yes.  
 22 Q. Did he tell you he was going to find  
 23 somebody local at that point, or did that not come  
 24 until later?  
 25 A. No. We knew that the building was

C

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE

---oOo---

THOMAS O'SHEA and ANNE DONAHUE O'SHEA,  
Trustees of the Thomas and Anne O'Shea Trust  
u/d/t DATED NOVEMBER 2, 1998; GRANDVIEW  
CREDIT, LLC, a California limited liability  
company; CALEB FOOT, an individual, KATE  
LARKIN DONAHUE, an individual, JOHN KEVIN  
DONAHUE, an individual, and SAN FRANCISCO  
RESIDENCE CLUB, INC., a California  
corporation,

Plaintiffs,

vs.

CASE NO.

CV-08-4025

HIGH MARK DEVELOPMENT, LLC, and Idaho limited  
liability company; GORDON ARAVE, individually  
and as Officer of High Mark Development, LLC;  
BENJAMIN D. ARAVE, individually and as  
Officer of High Mark Development,

Defendants.

DEPOSITION OF ANNE DONAHUE O'SHEA

July 9, 2009

---oOo---

Ref. No. 23341

Reported by: LAURA AXELSEN, CSR NO. 6173

RMR, CRP, CLR

1 You scanned the deposition --  
 2 A. That's what I did.  
 3 Q. Prior to scanning it, had you read it before  
 4 that?  
 5 A. No.  
 6 Q. Okay. You reviewed some e-mails, correct?  
 7 A. Yes.  
 8 Q. What e-mails do you remember?  
 9 A. The LoopNet listing from Jeff Needs.  
 10 Q. That was in an e-mail?  
 11 A. Yes.  
 12 Q. Any others?  
 13 A. I think there was -- LoopNet listing. I think  
 14 something with the estoppel on it.  
 15 Q. So you reviewed an estoppel certificate?  
 16 A. It was something talking about the estoppel.  
 17 Yes. Yes, it had the estoppel certificate. And something  
 18 about the expenses, income and expenses of us as a group.  
 19 Q. Is there any particular reason why you reviewed  
 20 those three items?  
 21 A. No.  
 22 Q. Were you asked to review those?  
 23 A. No.  
 24 Q. Okay. Did you meet with Mr. Shiffman prior to  
 25 coming to your deposition today?  
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1 Q. The night of his deposition?  
 2 A. Yes.  
 3 Q. Okay. Give me your fullest recollection of that  
 4 discussion.  
 5 A. It was a long day, lot of questions. Glad it  
 6 was over. I don't recall anything else specific.  
 7 Q. We're just going to kind of go through some of  
 8 the ground rules for giving a deposition. You're an  
 9 attorney, correct?  
 10 A. Yes.  
 11 Q. You understand what a deposition is?  
 12 A. Yes.  
 13 Q. What the purpose of a deposition is?  
 14 A. Yes.  
 15 Q. You've been put under oath to testify just as if  
 16 you were sitting in court?  
 17 A. Yes.  
 18 Q. The only difference is we don't have a judge  
 19 here to make any kind of ruling on objections that  
 20 Mr. Shiffman may or may not make?  
 21 A. Yes.  
 22 Q. The court reporter is taking down everything you  
 23 and I say, as you know. Our responses need to be verbal.  
 24 My questions need to be clear. If you don't understand a  
 25 question, you need to ask me to either restate it or have  
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1 A. Yes.  
 2 Q. Okay. And you met with him?  
 3 A. Yes.  
 4 Q. And how long was that meeting?  
 5 A. About 20 minutes, half-hour, I guess. About a  
 6 half-hour.  
 7 Q. Was that today or yesterday?  
 8 A. Yes.  
 9 Q. Today?  
 10 A. Today.  
 11 Q. Did you meet with anybody else?  
 12 A. My brother was with us.  
 13 Q. And you're motioning to your brother, Kevin?  
 14 A. Yes.  
 15 Q. Okay. And he was in that meeting as well?  
 16 A. Yes.  
 17 Q. Anything else that you did to prepare for your  
 18 deposition?  
 19 A. No.  
 20 Q. Have you talked with your husband about his  
 21 deposition?  
 22 A. A little bit.  
 23 Q. Okay. When did you discuss that with him?  
 24 A. Probably the only time was on the phone that  
 25 night after his deposition.  
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1 it read back to you.  
 2 We need to try to avoid head nods and uh-huhs  
 3 and uh-uhs because those can't get picked up by the court  
 4 reporter very easily. We want to make sure the record is  
 5 clear as possible.  
 6 So if you can remember that as we go through  
 7 proceedings today --  
 8 A. Okay.  
 9 Q. -- I would appreciate it. Are you under the  
 10 influence of any drug or alcohol or anything that would  
 11 impair your ability to recall events?  
 12 A. No.  
 13 Q. Okay. Back when you received your J.D. from the  
 14 University of San Francisco -- I want to go back to that  
 15 time. You said you received that degree in 1986?  
 16 A. Yes.  
 17 Q. What did you do upon graduating?  
 18 A. I took the bar exam.  
 19 Q. And then who was your first employer out of law  
 20 school?  
 21 A. Alameda County District Attorney's office.  
 22 Q. And were you a prosecutor?  
 23 A. Yes.  
 24 Q. And how long did you hold that position?  
 25 A. Uhm, 1986 until 1998. I may have said '96. I  
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- 1 meant to say '86. 1986. The end of that year until -- I  
2 think it was the fall of 1998.
- 3 **Q. And in the fall of 1998, what did you do**  
4 **professionally?**
- 5 A. I stopped working and was a stay-at-home mom.
- 6 **Q. Okay. And you have two children, correct?**
- 7 A. Yes.
- 8 **Q. Have you had previous marriages before**  
9 **Mr. O'Shea?**
- 10 A. No.
- 11 **Q. Have you ever been convicted of a crime?**
- 12 A. No.
- 13 **Q. Who was Gwen Donahue?**
- 14 A. My mother.
- 15 **Q. And what is her current health status?**
- 16 A. She has Alzheimer's.
- 17 **Q. How long has she had that ailment?**
- 18 A. I probably would be very wealthy if I knew that  
19 answer. I don't think anyone knows exactly, but it's been  
20 quite some time.
- 21 **Q. Has it been more than two years?**
- 22 A. Yes.
- 23 **Q. Where is she currently living?**
- 24 A. In Berkeley.
- 25 **Q. Is she in an assisted living center?**

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- 1 A. No.
- 2 **Q. Who is she living with?**
- 3 A. A caretaker.
- 4 **Q. And is it a full-time caretaker?**
- 5 A. Yes.
- 6 **Q. What is the caretaker's name?**
- 7 A. Christina Capo.
- 8 **Q. And how would you characterize Gwen's**  
9 **Alzheimer's disease or her mental capacity?**
- 10 A. At this moment?
- 11 **Q. At this moment, correct.**
- 12 A. Quite impaired. Forgetful is only part of it.  
13 Has difficulty with speech, completing sentences,  
14 following along. Recalls things that never happened.  
15 Amazingly recalls some things that seem minor. But many  
16 things that you think she would recall, she can't recall  
17 anymore. Doesn't recognize quite a few people. Anxious  
18 if there's any disruption to her routine. So if there's  
19 anything other than daily life, she gets incredibly  
20 anxious and upset, distraught. I think that about sums it  
21 up.
- 22 **Q. Would that be the same for her back in, say, the**  
23 **middle of 2007?**
- 24 A. No.
- 25 **Q. How was her condition at that time?**

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- 1 A. Much better than it is now. I'm trying to think  
2 back. She did not have a caregiver at that time. She had  
3 the Alzheimer's diagnosis, but she was still functioning  
4 and caring for herself.
- 5 **Q. Was she still trusted to make decisions with**  
6 **regard to the San Francisco Residence Club?**
- 7 A. Depends what the decision was.
- 8 **Q. Okay. Let's go to that entity for a few**  
9 **minutes. What is the San Francisco Residence Club?**
- 10 A. A family owned corporation.
- 11 **Q. And what family owns it?**
- 12 A. My brother, Kevin Donahue, my sister,  
13 Kate Donahue, my mother, Gwen Donahue, and me.
- 14 **Q. Okay. And does that constitute all of the**  
15 **shareholders in the San Francisco Residence Club?**
- 16 A. Yes, it does.
- 17 **Q. Are there any others?**
- 18 A. No.
- 19 **Q. How long have you been a shareholder of the**  
20 **San Francisco Residence Club?**
- 21 A. I don't actually know because my parents owned  
22 it. They're the ones that formed the corporation, and I'm  
23 not sure when it was formed and at what point I was made a  
24 shareholder.
- 25 **Q. Okay. Does your husband, Tom O'Shea, play any**

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- 1 **role in the San Francisco Residence Club?**
- 2 A. No.
- 3 **Q. Does he help that entity, make any kind of**  
4 **decision?**
- 5 A. No.
- 6 **Q. Who are the board members of the**  
7 **San Francisco Residence Club?**
- 8 A. The four of us.
- 9 **Q. Gwen Donahue?**
- 10 A. Kevin Donahue, Kate Donahue,  
11 Anne Donahue O'Shea.
- 12 **Q. Okay. Who is the oldest of the three siblings?**
- 13 A. Kevin.
- 14 **Q. And what is your age?**
- 15 A. 49.
- 16 **Q. And how old is Kate?**
- 17 A. I think she's 51.
- 18 **Q. Since we're on that subject, how old is Kevin?**
- 19 A. 54.
- 20 **Q. Okay.**
- 21 A. Sorry if I'm wrong.
- 22 **Q. That's fine.**
- 23 A. They're older. I wasn't there when they were  
24 born.
- 25 **Q. What -- do you hold a position in the**

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- 1 A. No opinion one way or the other.  
 2 Q. You don't have any feeling about that?  
 3 A. No.  
 4 Q. Were there lease estoppel certificates signed in  
 5 the Alabama cases?  
 6 A. I'm not sure.  
 7 Q. Do you remember reviewing any?  
 8 A. No. No. I may have reviewed some in May of '08  
 9 in Alabama.  
 10 Q. May, 2008. So after you had purchased the  
 11 properties?  
 12 A. Yes.  
 13 Q. Okay. Do you know if those estoppels were  
 14 available for you to review prior to the purchasing of  
 15 those properties in Alabama?  
 16 A. I don't know.  
 17 Q. Okay. You didn't ask to see any prior to  
 18 purchasing in Alabama?  
 19 A. I don't recall.  
 20 Q. If you'll turn to Exhibit 9, Page 2.  
 21 A. Exhibit -- oh, Exhibit 9, Page 2.  
 22 Q. I'm sorry. Page 2, Exhibit 9, Paragraph 3,  
 23 says, "The individual defendants, Gordon Arave, Jared  
 24 Arave, and Benjamin Arave, are residents of the State of  
 25 Idaho and owners and/or member managers of High Mark."

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- 1 Gordon Arave, individually and representing High Mark, was  
 2 also the seller of the property mentioned in Paragraph 1."  
 3 Do you have any evidence indicating that  
 4 Gordon Arave was a seller of this property?  
 5 A. I don't know what you mean.  
 6 Q. Do you know what is being relied on in  
 7 Paragraph 3 to allege that Gordon Arave, individual, was  
 8 the seller of the property?  
 9 A. I don't.  
 10 Q. Okay. Go to Paragraph 8, Page 3. Says, "On  
 11 August 11th, 2007, Fife responded to a question by  
 12 plaintiffs' real estate agent, Jeff Needs, by sending an  
 13 e-mail, which stated that Gordon Arave was the seller of  
 14 the subject property."  
 15 Do you know if there's any other information out  
 16 there that would indicate that you would have relied on in  
 17 believing the Gordon Arave was the seller of this  
 18 property?  
 19 A. I don't know if there's any other information.  
 20 Q. Okay. Was it important to you to know who  
 21 seller of the property was?  
 22 A. I have no opinion or recollection about that at  
 23 the time.  
 24 Q. Did you ever do an independent analysis of who  
 25 the owner was on the property?

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- 1 A. No.  
 2 Q. Okay. Did you ever ask to have a title search  
 3 done on the property?  
 4 A. No.  
 5 Q. Do you know if one was ever done?  
 6 A. No.  
 7 Q. As a real estate investor -- strike that.  
 8 How long have you been a real estate investor?  
 9 A. What do you mean by real estate investor?  
 10 Q. Well, we've got this 1031 exchange or series of  
 11 exchanges in 2007 dealing with six properties in Alabama  
 12 property in Idaho, property in Hawaii, plus the  
 13 San Francisco Residence Club. Prior to 2007, did you  
 14 actively invest in real estate?  
 15 A. "Actively" is a term you're going to have to  
 16 define.  
 17 Q. Did you invest in real estate?  
 18 A. Yes.  
 19 Q. Okay. Were they significant investments in real  
 20 estate?  
 21 A. Everything -- yes.  
 22 Q. Okay. Well, help me understand -- I want to  
 23 understand what your experience is in real estate  
 24 investing prior to 2007?  
 25 A. Okay.

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- 1 Q. What was the experience?  
 2 A. First property that I bought was with my sister,  
 3 a three-plex that I lived in in Oakland.  
 4 Q. When was this investment?  
 5 A. That was -- I think -- I think that was 1983.  
 6 Q. Okay. After that?  
 7 A. My sister and I sold that and bought an  
 8 apartment building in San Francisco.  
 9 Q. Your sister Kate?  
 10 A. Yes. I bought a house.  
 11 Q. When was the apartment complex?  
 12 A. Pardon me?  
 13 Q. When did you buy the apartment complex?  
 14 A. I'm not exactly sure. Might have been '85.  
 15 Q. Okay. So you started investing in real estate  
 16 by buying a three-plex in 1983?  
 17 A. Yes.  
 18 Q. And between 1983 and 2007, how many pieces of  
 19 real estate have you been an investor in?  
 20 A. I'm not sure off the top of my head. More than  
 21 20.  
 22 Q. More than 20?  
 23 A. Yes.  
 24 Q. Okay. Do you have a list of those properties  
 25 that you've invested in in that period of time?

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1 Q. Well, do you think it was reasonable for you to  
2 invest the money that you did in this property without  
3 asking to review certain financial information?  
4 A. You're asking two questions at once. You're  
5 going to have to break it down.  
6 MR. SHIFFMAN: Let me ask a question. Are you  
7 asking her "you" being you, Anne O'Shea --  
8 MR. ARMSTRONG: Yes. Yes.  
9 MR. SHIFFMAN: -- not you Anne and Tom O'Shea  
10 Trust that invested in the property?  
11 MR. ARMSTRONG: Well --  
12 MR. SHIFFMAN: Because she's already testified  
13 that her husband told her that he had --  
14 MR. ARMSTRONG: Well --  
15 MR. SHIFFMAN: -- reviewed information, and she  
16 relied on that.  
17 MR. ARMSTRONG: Q. Well, I want to understand  
18 whether you being a member in the trust that invested in  
19 that property -- you've testified you're one of the  
20 co-trustees in the trust, correct?  
21 A. Yes, I am.  
22 Q. Okay. You now own an interest in this property  
23 in Idaho Falls, correct?  
24 A. Yes.  
25 Q. Okay. Do you think it is reasonable -- well,  
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1 MR. ARMSTRONG: Q. What you testified to, you  
2 reviewed the LoopNet listing, correct?  
3 A. I reviewed the LoopNet listing.  
4 Q. You have reviewed the Internet site for the  
5 Children's Center?  
6 A. Yes.  
7 Q. Okay. You reviewed the lease agreement?  
8 A. Yes.  
9 Q. And you reviewed either the estoppel certificate  
10 or an explanation of the estoppel certificate?  
11 A. Yes.  
12 Q. Okay. That's it, correct, as far as what you  
13 relied on vis-a-vis --  
14 A. No.  
15 Q. Okay. We've talked about the other intangible  
16 things. For instance, you liked the business, you've been  
17 through the area and you looked at it. Am I missing  
18 anything else?  
19 A. Yes.  
20 Q. What?  
21 A. I said that we had some discussion with  
22 Jeff Needs. We had -- I got information from my husband.  
23 I relied on my husband's judgment.  
24 Q. Okay. And I guess I'm going to ask you the  
25 question again. Do you think that that's reasonable for  
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1 strike that.  
2 You testified you didn't ask to review any  
3 financial information, you, yourself.  
4 A. Correct.  
5 Q. Do you think that that is reasonable as an  
6 investor in real property in real estate?  
7 A. Yes.  
8 Q. Why do you think that?  
9 A. Because of my role. It was reasonable for me.  
10 Q. Okay. What was your role?  
11 A. I think I've already explained that I was back  
12 seat --  
13 Q. Okay.  
14 A. -- in this transaction.  
15 Q. So you took a back seat approach to this  
16 transaction?  
17 A. Yes. I had very little of -- I had minimal role  
18 in this. I don't even know the --  
19 Q. Not only minimal --  
20 A. Role.  
21 Q. -- you didn't review any information related to  
22 this transaction?  
23 MR. SHIFFMAN: Wait. Wait. Wait.  
24 THE WITNESS: That's incorrect. That's  
25 incorrect. That's incorrect.  
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1 you to rely on your husband like that?  
2 A. Yes.  
3 Q. Okay. Do you think it's reasonable for the  
4 other plaintiffs in this case to --  
5 A. They're -- go ahead.  
6 Q. Do you think it's reasonable for them to rely,  
7 as you did, on your husband's judgment and on -- well, I  
8 don't know what they relied on, but --  
9 A. I don't have an opinion about that.  
10 Q. Okay. Are you aware of the stance that the  
11 other investors in this property took? Was it a similar  
12 stance that you took, i.e., a back seat?  
13 A. I don't know.  
14 Q. Do you have any knowledge about the tenant  
15 that's currently in this premises at Idaho Falls?  
16 A. A little.  
17 Q. What do you know about them?  
18 A. Similar business to the Children's Center. They  
19 signed a lease. they have moved in, they have paid rent.  
20 Q. Now, the term -- are you familiar with the term  
21 of that tenant's lease?  
22 A. Vaguely.  
23 Q. What is it do you recall?  
24 A. I think it was -- I think it was three years.  
25 Q. Okay. Is anything being done by you or any of  
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D

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT STATE OF IDAHO, COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas )  
and Anne O'Shea Trust u/d/t )  
DATED NOVEMBER 2, 1998; GRAND- )  
VIEW CREDIT, LLC, a California )  
limited liability company, )  
CALEB FOOT, an individual, )  
KATE LARKIN DONAHUE, an )  
individual, JOHN KEVIN DONAHUE, ) Consolidated  
an individual, and SAN ) Case No: CV-08-4025  
FRANCISCO RESIDENCE CLUB, INC., )  
a California corporation, ) (30 (b) (6)

Plaintiffs )

vs. )

HIGH MARK DEVELOPMENT, LLC, an )  
Idaho Limited Liability Company; )  
GORDON ARAVE, individually and )  
as Officer of High Mark )  
Development, LLC; BENJAMIN D. )  
ARAVE, individually and as )  
Officer of High Mark Development )

Defendants. )

DEPOSITION OF JACK ANTHONY CHILLEMI

Tuesday, September 29, 2009, 12:05 p.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

**COPY**

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RMR, RPR, CSR

PREPARED FOR: Mr. Armstrong

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DEPOSITION OF JACK ANTHONY CHILLEMI - 09-29-09

SHEET 3 PAGE 9

PAGE 11

1 A Correct.  
2 **Q Did they give any thoughts of theirs on**  
3 **what to look for particularly with regard to certain**  
4 **documents?**  
5 A I don't recall anything specific.  
6 **Q How about generally.**  
7 A Could you restate the question, please.  
8 MR. ARMSTRONG: Could you read it back.  
9 (question read)  
10 THE WITNESS: In terms of, generally,  
11 it was more of a conversation. Just make sure  
12 that you're familiar with all of the information  
13 that you're probably going to be asked to, or be  
14 deposed on.  
15 In terms of something specific, I don't  
16 recall that.  
17 BY MR. ARMSTRONG:  
18 **Q Okay. You talked with Tom O'Shea about**  
19 **that?**  
20 A Correct.  
21 **Q You talked with Anne O'Shea about that?**  
22 A Correct.  
23 **Q What did Tom tell you you ought to**  
24 **review to prepare for your deposition?**  
25 A Just to insure that I was as thorough

1 since the two of us traveled together for the  
2 deposition. It has been more of the same, to  
3 prepare for providing a deposition.  
4 **Q Did you talk with Caleb in your**  
5 **discussions about documents that you had reviewed or**  
6 **information that you had received prior to the**  
7 **closing of the purchase and sale in this case?**  
8 A Yes. One of the things that we spoke  
9 of was the information that we recall seeing prior  
10 to the close, which included a couple of pages of  
11 tax returns, a profit and loss statement, and also  
12 some of the discussions that we had with Tom  
13 individually regarding the positive aspects of this  
14 investment opportunity.  
15 **Q Okay. Anything else that you can**  
16 **recall that you did to prepare for your deposition**  
17 **today --**  
18 A No.  
19 **Q -- other than what you testified to?**  
20 A No.  
21 **Q Okay. Let's go back. What is your**  
22 **highest level of education?**  
23 A I have a bachelor's degree in business  
24 administration.  
25 **Q Okay. Where did you get that?**

PAGE 10

PAGE 12

1 as possible, and to be familiar with the documents  
2 since it has been about a year since a lot of this  
3 stuff came up.  
4 **Q Did he mention you should review any**  
5 **particular document?**  
6 A He did not outline one in particular.  
7 It was more along the lines of: Review all the  
8 documents.  
9 **Q Okay. How about Anne?**  
10 A She was pretty much consistent with  
11 what Tom was saying. I think the two of them were  
12 both together while we were chatting about it, so it  
13 would have been the three of us.  
14 **Q How about Kevin Donahue?**  
15 A Kevin Donahue was more along the lines  
16 of just, you know: Don't get nervous during the  
17 deposition. Just answer everything as you recall,  
18 and if you don't recall something state it as such.  
19 **Q Okay. How about with Kate: What was**  
20 **your discussion with her?**  
21 A I don't recall that. It would have  
22 been almost nothing. I recall her being there. I  
23 don't recall specifically what she said.  
24 **Q Okay. How about with Caleb Foote?**  
25 A Caleb and I have been discussing this

1 A California State University at Hayward.  
2 **Q Is that a Bachelor of Science degree or**  
3 **Bachelor of Arts?**  
4 A I believe it's a Bachelor of Arts.  
5 **Q Where was that received?**  
6 A I believe it was California State  
7 University at Hayward.  
8 **Q Okay. When did you receive that**  
9 **degree?**  
10 A 1991.  
11 **Q Okay. And that was in business**  
12 **administration?**  
13 A Correct.  
14 **Q So you graduated or received your**  
15 **degree in 1991?**  
16 A Correct.  
17 **Q Where did you grow up?**  
18 A San Francisco Bay area.  
19 **Q Okay. And after receiving your**  
20 **Bachelor of Science degree, what did you do?**  
21 A I worked as an auditor for about nine  
22 months on a temporary basis -- excuse me. I need to  
23 rephrase that. That is not accurate. I worked as a  
24 work-in-progress accountant on a temporary basis at  
25 Chevron Corporation.

690

DEPOSITION OF JACK ANTHONY CHILLEMI - 09-29-09

SHEET 4 PAGE 13

1 Q Okay. Chevron Corporation?  
2 A Correct.  
3 Q What were your duties as a  
4 work-in-progress accountant?  
5 A It was reconciling fixed assets,  
6 specifically pipeline equipment and what they  
7 considered upstream production. Getting oil out of  
8 the ground basically.  
9 Q Was it an accounting job or position?  
10 A It could be considered some accounting  
11 responsibilities. It was more of a reconciliation  
12 job. It was not -- it was a -- how do I describe  
13 it? It was more of a bookkeeping-type-of position.  
14 It was not accounting per se.  
15 Q Okay. Are you a CPA?  
16 A No.  
17 Q Have you ever sat for the CPA exam?  
18 A No.  
19 Q Do you have any intentions of doing so?  
20 A No.  
21 Q After you worked as a work-in-progress  
22 accountant for Chevron Corporation -- was that in  
23 1991?  
24 A That would have been in 1992.  
25 Q That was for nine months?

PAGE 15

1 Q Okay. And was that leasing of  
2 equipment real property? What?  
3 A Leasing of equipment, correct. Vendor  
4 financing.  
5 Q Okay. And in 2001, where did you go?  
6 A 2001 I left Technology Credit  
7 Corporation and I started Grandview Credit on my  
8 own. That was actually in January of 2002.  
9 Q Okay. So did you quit?  
10 A It was a mutual separation at  
11 Technology Credit Corporation.  
12 Q So it was just a mutual walk-away, I  
13 guess?  
14 A Well, the business model changed. The  
15 specifics of the industry changed based on the  
16 market changed. This was a tech job, and the tech  
17 sector ended approximately in 2000, 2001. There  
18 just wasn't any volume with which to go after that  
19 made it worthwhile with that company.  
20 Q So revenue had dropped?  
21 A Correct.  
22 Q You started Grandview Credit, LLC?  
23 A Correct.  
24 Q Okay. And what is Grandview Credit,  
25 LLC?

PAGE 14

1 A That's correct.  
2 Q What did you do after that?  
3 A I worked for a CPA firm doing what they  
4 call -- let me think a moment -- compliance  
5 auditing.  
6 Q Who was the firm?  
7 A Lindquist & Company.  
8 Q Is that in San Francisco?  
9 A That was in San Ramon, California.  
10 Q Okay. How long did you hold that  
11 position?  
12 A Approximately two years.  
13 Q So that was until about 1994?  
14 A Correct.  
15 Q Okay. What happened in 1994?  
16 A Ninety-four I accepted a position as a  
17 lease financing sales person. It's a financial  
18 sales position basically.  
19 Q Okay. And what was the company?  
20 A Technology Credit Corporation.  
21 Q Okay. That was your employer?  
22 A Correct.  
23 Q Okay. How long did you hold that  
24 position?  
25 A From 1994 until 2001.

PAGE 16

1 A Grandview Credit, LLC is an entity that  
2 I created with the intention to continue to provide  
3 lease financing services to some of the clients,  
4 some of the relationships that I had established  
5 during my years at Technology Credit Corporation.  
6 Q Okay. So essentially to continue  
7 providing the same types of leasing services or  
8 financing arrangements that you provided with  
9 Technical --  
10 A Tech Credit.  
11 Q Tech Credit?  
12 A Correct.  
13 Q Okay. You formulated, or established  
14 Grandview Credit in January of 2002?  
15 A That's correct.  
16 Q And how many members does that LLC  
17 have?  
18 A One.  
19 Q And is that yourself?  
20 A Correct.  
21 Q Is it member managed or manager  
22 managed?  
23 A I don't understand the difference.  
24 Q Do you have any managers that are not  
25 members of the entity?

691

DEPOSITION OF JACK ANTHONY CHILLEMI - 09-29-09

SHEET 5 PAGE 17

1 A No.  
2 Q You're the sole manager?  
3 A Correct.  
4 Q Does it have an office or a central  
5 location?  
6 A It's my personal residence.  
7 Q Okay. Do you have any employees -  
8 A No.  
9 Q - other than yourself?  
10 A Just myself.  
11 Q Do you consider yourself to be an  
12 employee?  
13 A I would consider myself to be an  
14 employee. Actually I don't know the distinction. I  
15 mean, I do - I am the only person that is involved  
16 in Grandview Credit.  
17 Q Okay. Do you pay yourself a salary  
18 from Grandview Credit, or do you just take  
19 distributions as a K-1?  
20 A I take distributions as a K-1.  
21 Q Okay. Any other compensation that you  
22 receive from Grandview Credit?  
23 A No.  
24 Q Okay.  
25 MR. ARMSTRONG: I guess we're going in

PAGE 19

1 Q And there are a number of subjects that  
2 are identified on the second page, the second page  
3 of this notice, Exhibit 1.  
4 Have you reviewed prior to today those  
5 subjects or topics?  
6 A Some of them, yes.  
7 Q Okay. When you say "some of them",  
8 what do you mean?  
9 A I don't believe I reviewed in its  
10 entirety Number 5 - excuse me. That is not right.  
11 I am familiar with Number 5. I believe I have  
12 reviewed all of them.  
13 Q Okay. So are you the best person to  
14 testify about each of these topics that are set  
15 forth -  
16 A Yes.  
17 Q - set forth in Exhibit 1 to your  
18 deposition?  
19 A Yes.  
20 Q Okay. Let's go back to when you first  
21 heard about an investment opportunity in Idaho  
22 Falls.  
23 A Okay.  
24 Q Do you recall when that occurred?  
25 A It would have been sometime in the

PAGE 18

1 sequential order for Mr. Foote's deposition.  
2 (off record)  
3 (Exhibits 1 & 2 marked)  
4 BY MR. ARMSTRONG:  
5 Q Do you have any medical conditions that  
6 would prevent you from recalling events?  
7 A No.  
8 Q Are you under the influence of any  
9 alcohol or drugs or medication that prevents you  
10 from recalling events?  
11 A No.  
12 Q As you know she's taking down  
13 everything that I am saying, that you're saying. We  
14 can't talk over each other. Please wait until I get  
15 my question on the record, then you can give your  
16 response.  
17 A I understand.  
18 Q You need to be verbal, just like we  
19 went through with Mr. Foote's deposition. You were  
20 handed Exhibit 1 to your deposition. Do you  
21 recognize that?  
22 A Yes.  
23 Q And that is the Notice of Deposition  
24 for Grandview Credit, is that correct?  
25 A Correct.

692

PAGE 20

1 summer of 2007.  
2 Q Okay. And who presented that to you?  
3 A Tom O'Shea.  
4 Q Okay. How do you know Tom O'Shea.  
5 A I have known Tom O'Shea for ten years.  
6 We have been neighbors - we were neighbors from  
7 1998 until 2006.  
8 Q Okay. And did your parents know each  
9 other?  
10 A No.  
11 Q How were you neighbors?  
12 A I lived two doors away from him.  
13 Q Okay. And you'll have to pardon me.  
14 I don't know your background. And the way we do  
15 depositions: Sometimes we ask the most obvious  
16 questions. Sometimes they seem silly. So I  
17 apologize beforehand.  
18 What were the circumstances of you  
19 being approached by Mr. O'Shea to invest in this, in  
20 the Idaho Falls property?  
21 A I am at the O'Shea's house a lot  
22 especially while I was living there. In 2007 I  
23 would not have been living there any more. It would  
24 have been during one of the times that I was there,  
25 in their house.

1 Q Okay. Were you friends with any of  
2 their other family members?  
3 A I knew them in terms of -- yeah, I  
4 would call them friends. Absolutely.  
5 Q Were you friends with any of the other  
6 co-investors in this case, for instance, Kevin  
7 Donahue?  
8 A I would call, at the time, my  
9 relationship with Kevin as more of an acquaintance.  
10 I would consider us friends now.  
11 Q Okay.  
12 A Same would go for Kate.  
13 Q Okay. Why do you consider yourself  
14 more to be a friend now with Kevin than prior to  
15 investing here in Idaho Falls?  
16 A I've gotten to know Kevin a lot more  
17 over the last two years since we began investing  
18 together.  
19 Q Okay.  
20 A The frequency with which I interact  
21 with him is much higher now.  
22 Q Okay. So there are other investments  
23 that you've had with Mr. Donahue as well as some of  
24 the other co-investors other than the Idaho Falls  
25 property?

1 A There is one other.  
2 Q What other property is that?  
3 A It's a property in Alabama that we  
4 commonly refer to as the Park Tower.  
5 Q You're a party in that -- I should say  
6 Grandview Credit is a party to a litigation pending  
7 in Alabama currently, is that correct?  
8 A Correct.  
9 Q Okay. Have you been -- strike that.  
10 Is Grandview Credit a party to any other litigation  
11 other than a litigation in Alabama relating to the  
12 Park Tower investment and the lawsuit that is  
13 pending here in Idaho Falls?  
14 A No.  
15 Q You're not a party to any litigation in  
16 Hawaii?  
17 A No.  
18 Q Okay. When was your investment in the  
19 Park Tower property.  
20 A That investment closed -- that  
21 opportunity closed September 20, approximately, of  
22 2007.  
23 Q Okay. And prior to investing in  
24 Alabama at the Park Tower investment, had you  
25 physically gone to Alabama to do some due diligence

1 with regard to that property?  
2 A Yes.  
3 Q When did you travel there?  
4 A Excuse me. I would like to clarify. I  
5 went to Alabama -- it was not to do due diligence  
6 specifically on the Park Tower opportunity.  
7 Q Okay. You went to Alabama once?  
8 A Yes.  
9 Q Okay. What did you go to Alabama for  
10 during that one time?  
11 A I went to Alabama to familiarize myself  
12 with the City of Huntsville where we understood that  
13 there was some investment opportunities available.  
14 Q Okay.  
15 A For clarification, I actually did go to  
16 Huntsville a second time, but that was after we  
17 closed that opportunity.  
18 Q Okay. Between the time that you became  
19 aware of the investment in Idaho Falls -- or the  
20 investment opportunity and the time that it closed  
21 in December of 2007, how many times had you gone to  
22 Alabama?  
23 A Could you restate that?  
24 Q Sure. How many times did you  
25 physically go to Alabama prior to closing on the

1 property here in Idaho Falls?  
2 A Twice.  
3 Q Okay. Who did you go with, if anyone?  
4 A The first time with Tom O'Shea and  
5 Kevin Donahue. The second time only with Tom  
6 O'Shea.  
7 Q Okay. Do you recall the dates of those  
8 visits?  
9 A Approximately the end of January 2007  
10 and sometime in the early part of October 2007.  
11 Q Okay. How long was the visit in early  
12 October 2007?  
13 A Approximately three or four days.  
14 Q Okay. And that was with just Tom  
15 O'Shea?  
16 A Correct.  
17 Q Did you travel together?  
18 A Yes.  
19 Q Have you had your deposition taken in  
20 the Park Tower case?  
21 A No.  
22 Q Lets go back to when you were  
23 approached about an investment opportunity in Idaho  
24 Falls. Tom O'Shea was the one who had approached  
25 you?



1 A No.  
2 Q Do you think that would have been a  
3 fair source of identifying who the seller is?  
4 A I think it could have been a fair --  
5 Q Okay. Were you aware, prior to the  
6 closing, of personal obligations that Gordon Arave  
7 had offered to take on with regard to the sale of  
8 this particular property?  
9 A Personal obligations: Could you  
10 clarify that?  
11 Q Well, were you aware of an agreement in  
12 one of the addenda to the real estate purchase  
13 contract that dealt with Mr. Arave personally  
14 indemnifying the buyers in the event the option was  
15 ever exercised by the tenant?  
16 A I never saw anything in writing about  
17 that. But Tom O'Shea did mention that in one of our  
18 discussions. I believe that would have been a group  
19 discussion.  
20 I do know that the removal of the  
21 purchase option was something that he and  
22 Mr. Shiffman were working on diligently. I got the  
23 impression at the time that that was something that  
24 was not acceptable to us to have that purchase  
25 option contained in the document -- in the lease

1 investment. We would not have been able to  
2 control -- I don't know. Control may not be the  
3 right word.  
4 But we felt that that put us in a  
5 position that we were not comfortable with. If the  
6 tenant decided to exercise that option, it could  
7 have resulted in a loss part of our investment.  
8 Q So it was important to the group to  
9 resolve that option?  
10 A I felt that the group felt that way at  
11 the time, yes.  
12 Q You mentioned this list of documents  
13 that you reviewed, which included Exhibit 4 perhaps  
14 with that assumption letter or that fax cover sheet  
15 that you had described --  
16 A Correct.  
17 Q -- the partial P&L that is Exhibit 2 to  
18 Caleb Foote's deposition as well as a few pages to  
19 Exhibit 1 of the Caleb Foote deposition; is that  
20 correct?  
21 A Correct.  
22 Q Any other documents that you remember  
23 looking at or reviewing that you would have been  
24 relying upon in deciding whether to invest in this  
25 property?

1 agreement.  
2 Q In the lease?  
3 A Yeah.  
4 Q It was not acceptable?  
5 A That was my impression.  
6 Q Okay. Was that your feeling?  
7 A From the way that it was described to  
8 me by Tom O'Shea, I agree.  
9 Q Okay. Did you ever look at the option  
10 in the lease agreement and come to your own  
11 conclusion?  
12 A No.  
13 Q Had you ever read the lease agreement  
14 prior to the closing?  
15 A Not prior to the closing.  
16 Q Okay. Was it important to you to have  
17 this option released from the lease agreement?  
18 A From the way that Tom O'Shea described  
19 it, yes.  
20 Q How did he describe it to you?  
21 A After explaining the implication of  
22 having that option in the lease, meaning that our  
23 concern as the owners of the building would have  
24 been -- feel locked in by something like that, we  
25 felt that we could have lost a portion of the

1 A No.  
2 Q How much was the investment that  
3 Grandview Credit made into this property?  
4 A \$400,000.  
5 Q Was that a cash investment, or was that  
6 a like-kind exchange?  
7 A That was a cash investment.  
8 Q What was the source of those funds?  
9 A Moneys that Grandview Credit had -- are  
10 you asking how Grandview Credit got the money?  
11 Q Yes.  
12 A Based on investment -- private moneys  
13 that I put into the company in the form of owner's  
14 equity. Also from a prior transaction -- a prior  
15 development project that Grandview Credit  
16 participated in in 2002.  
17 Q Okay. So, was there a check, wire  
18 transfer made? How did that money get transferred?  
19 A It would have been a wire transfer.  
20 Q Okay. Was any of that money held in  
21 escrow to help operate -- strike that. Was that  
22 money invested all in the -- at one time as an  
23 investment into this property?  
24 A In terms of investing in the Idaho  
25 Falls' project?

1 Q Correct.

2 A Yes. If you're asking if it came in  
3 one lump sum: It came in two sums. There was a  
4 \$50,000 earnest deposit. Then there was a \$350,000  
5 wire transfer as well.

6 Q Okay.

7 Again, as far as the moneys being  
8 available for the purchase of that property, the  
9 property in Idaho Falls; was any of the money that  
10 you had chosen to invest kept in an operating  
11 account in order to maintain the property or  
12 anything like that?

13 A In Grandview?

14 Q No. It had been paid by Grandview,  
15 correct? It had been transferred into -- explain  
16 that to me. It was transferred by wire transfer  
17 into an account presumably?

18 A It was transferred directly to the  
19 escrow closing agent I believe.

20 Q Okay. All of that money you had  
21 invested was applied towards the purchase?

22 A Correct. I am confused. Are you  
23 asking me how the money got into Grandview, or how  
24 the money got from Grandview into the escrow close,  
25 the Idaho --

1 that authorization from Grandview Credit to do that  
2 investigation, or was it just understood?

3 A I believe it was just understood.

4 Q Okay. Grandview Credit did not know  
5 Jeff Needs prior to this transaction?

6 A Correct.

7 Q And did you understand Jeff Needs was  
8 representing your interests, Grandview Credit's  
9 interest with regard to the purchase of this  
10 property?

11 A I understood that Jeff Needs was  
12 representing Tom O'Shea's interest initially, and  
13 when I decided to come on board, that he was then  
14 also representing Grandview Credit's.

15 Q Did you ever feel the need to have  
16 somebody specifically representing you step in and  
17 do some due diligence to review financials?

18 A No, not based on what my perception is  
19 of Tom's O'Shea's ability to do due diligence.

20 Q What is that perception?

21 A I understand -- I perceive that Tom  
22 O'Shea has 20-plus years of real estate investing  
23 experience primarily in residential multi-tenant --  
24 I am sorry. Not residential. Correct that.  
25 Multi-tenant commercial buildings. That he had

1 Q The latter. How Grandview --

2 A It would have been a wire transfer.

3 Q It would have gone to an escrow  
4 officer. And all of the moneys that Grandview had  
5 chosen to invest were then used to purchase this  
6 property, not held in reserve, to operate the  
7 building after the purchase?

8 A Correct.

9 Q Okay. What is the percentage of  
10 interest that Grandview Credit has in the tenancy in  
11 common?

12 A 28.35 percent.

13 Q What other due diligence did  
14 Grandview -- I am assuming when Grandview -- if  
15 Grandview did any due diligence with regard to this  
16 investment it was done through you?

17 A It would have been beyond what I  
18 described thus far.

19 Grandview relied on Tom O'Shea to do  
20 the majority of the due diligence.

21 Q Okay. Did you have just a simple  
22 understanding with Mr. O'Shea that he would be the  
23 one doing the investigation of this property?

24 A Yes.

25 Q Was it specifically said that he had

1 experienced quite a bit of success in the past doing  
2 that.

3 Q Okay.

4 Anything else that you would point to  
5 that would give you confidence or allow you to  
6 assume that Mr. O'Shea was doing good in  
7 investigating into this property?

8 A Could you define "good". Would you  
9 call that proficient, or would you call that did I  
10 trust him?

11 Q Well, I guess either.

12 A Tom O'Shea is one of my closest  
13 friends. I guess, I would say both.

14 Q Did you at the same time trust that  
15 Jeff Needs was relaying accurate information to  
16 Mr. O'Shea?

17 A I did not know one way or the other at  
18 the time.

19 I had no reason to believe otherwise.  
20 I still don't have any reason to believe otherwise.

21 Q Okay. Have you read any of the  
22 depositions in this case; for instance, the  
23 deposition of Jeff Needs?

24 A Yes.

25 Q And have you read the deposition of

1 Mr. Fife?

2 A Yes.

3 Q Have you read the testimony that was  
4 given in those depositions about the discussions  
5 that those gentlemen had with each other about the  
6 consideration that was paid for the option to be  
7 released from the lease in this case?

8 A Yes.

9 Q Okay. And does that change your  
10 opinion at all as to whether Jeff Needs was relaying  
11 accurate information to Mr. O'Shea?

12 A I am not aware that Jeff Needs had any  
13 knowledge of what the specific consideration was, if  
14 that is what you're asking. If you're asking  
15 whether or not Jeff Needs was aware that there was  
16 some consideration, I don't know for sure.

17 Q Okay.

18 A I don't recall.

19 Q Did you ever ask that question when you  
20 found out that the option had been released as to  
21 what the consideration was?

22 A No. It was my assumption that the  
23 seller persuaded the tenant to release that option  
24 in an effort to get the transaction to go through.  
25 I was satisfied with that understanding.

1 A (witness complies).

2 Q Is that your signature on that  
3 document?

4 A Yes.

5 Q And did you understand that when you  
6 were signing this document you were certifying or  
7 testifying that your answers to interrogatories or  
8 Grandview Credit's answers to interrogatories were  
9 true and correct to the best of your knowledge?

10 A Yes.

11 Q Okay.

12 What involvement have you had -- what  
13 involvement did you have, if any, in seeking to  
14 relet the property at 1675?

15 A I was involved in some of the  
16 discussions with Brent Butikofer who was our -- who  
17 was an individual -- he is a broker here in Idaho  
18 Falls.

19 Q So you had discussions with  
20 Mr. Butikofer?

21 A With the group, yes.

22 Q And was there any discussion about  
23 making tenant improvements, partition the property  
24 so that it could be relet to other potential  
25 tenants?

1 Q Help me understand that. You had  
2 assumed there was some persuasion or some sort of  
3 a -- something occurred that persuaded the tenant to  
4 release that option.

5 You were fine with that?

6 A Yes.

7 Q But you, yourself, did not know  
8 specifically what that deal was or what had been  
9 negotiated?

10 A Not at that time, no.

11 Q Did you -- again, I don't know if you  
12 answered my question. But, did you ever ask that  
13 question of either Tom O'Shea or Jeff Needs?

14 A No.

15 Q So in your mind you were satisfied that  
16 the option was not there. However they got to that  
17 point, I am fine with that.

18 A Correct.

19 Q Is that a fair statement?

20 A Yes.

21 Q I am handing you what was marked as  
22 Exhibit 2 to your deposition. Have you ever seen  
23 that document before?

24 A Yes.

25 Q Turn to the second to the last page.

696

1 A Yes.

2 Q And what was said in that regard, if  
3 anything?

4 A I don't recall specifics. I do recall  
5 that it was brought up -- it was a strategy. In  
6 that it may be easier to find three tenants  
7 requiring less space than one single tenant  
8 requiring the entire 20,000-plus square foot  
9 location.

10 Q Who had mentioned that?

11 A I don't recall.

12 Q And tell me -- give me your fullest  
13 recollection of a discussion that was held on this  
14 issue.

15 A I recall that Brent specifically --  
16 well, not specifically. Brent discussed that there  
17 would be added costs for the group if there were any  
18 significant modifications necessary in order to  
19 allow for the separation of the building in to three  
20 distinct units.

21 I believe Jeff Needs was also involved  
22 in that conversation. I don't recall specifically  
23 what each one of them said in terms of proposing all  
24 of this to the group for consideration; but the two  
25 of them were actively in the conversation with us.

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697

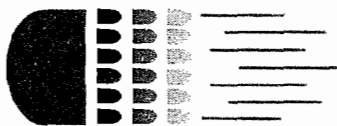
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT STATE OF IDAHO, COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas )  
and Anne O'Shea Trust u/d/t DATED )  
NOVEMBER 2, 1998; GRANDVIEW ) Consolidated  
CREDIT, LLC, a California Limited ) Case No.  
Liability Company; CALEB FOOT, an ) CV-08-4025  
individual; KATE LARKIN DONAHUE, )  
an individual; JOHN KEVIN )  
DONAHUE, an individual; and SAN )  
FRANCISCO RESIDENCE CLUB, INC., a )  
California Corporation, )  
)  
Plaintiffs, )  
vs. )  
)  
HIGH MARK DEVELOPMENT, LLC, an )  
Idaho Limited Liability Company; )  
GORDON ARAVE, individually and as )  
Officer of High Mark Development, )  
LLC; BENJAMIN D. ARAVE, )  
individually and as Officer of )  
High Mark Development, )  
)  
Defendants. )

DEPOSITION OF KEVIN DONAHUE

Thursday, September 24, 2009, 10:19 A.M.

Idaho Falls, Idaho



T&T REPORTING

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**COPY**

REPORTED BY:

M. Rainey Stockton  
CSR 746

PREPARED FOR:

Mr. Armstrong

POST OFFICE BOX 51020

IDAHO FALLS, IDAHO 83405

698

208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

1 Q. Okay. So, Mr. O'Shea -- Tom O'Shea  
2 doesn't own any shares.  
3 A. He does not.  
4 Q. Okay. When you invested the 72,000  
5 into the 1675 property, was that a cash  
6 investment?  
7 A. No.  
8 Q. What kind of an investment was that?  
9 A. It was a 1031.  
10 And that was also a family investment.  
11 Q. So, the 72,000 --  
12 When you say it was a family  
13 investment, help me understand that.  
14 A. I also owned the property with my  
15 family; not as FRC.  
16 Q. Okay. So, you own an interest in the  
17 TIC individually as Kevin Donahue.  
18 A. Correct.  
19 Q. What was your investment  
20 individually --  
21 A. The --  
22 Q. -- into the 1675 Curlew property?  
23 Sorry.  
24 A. What was the amount?  
25 Q. Correct.

1 A. Approximately, 72,000.  
2 Q. That \$72,000 investment that you made  
3 individually, was that a cash investment?  
4 A. It was not.  
5 Q. Okay. It was a 1031 Exchange?  
6 A. Correct.  
7 Q. And what was the -- what were the  
8 properties that were the subject of that  
9 exchange?  
10 A. There was a car dealership in Florida  
11 and there was an apartment building in Oakland,  
12 California.  
13 Excuse me, the car dealership was not  
14 in Florida. It was in Mississippi.  
15 Q. Is that something that you owned, the  
16 car dealership?  
17 A. I was an investor in it.  
18 Q. So, you owned a particular  
19 percentage --  
20 A. Correct.  
21 Q. -- of the car dealership?  
22 A. Correct.  
23 Q. Okay. And the ownership in that was  
24 exchanged and invested, if you will, into the  
25 1675 Curlew property?

699

1 A. Correct.  
2 Q. And then there was an apartment  
3 building in Oakland?  
4 A. Correct.  
5 Q. Did you have tax or legal counsel in  
6 relation to these 1031 Exchanges?  
7 A. I don't believe so. I don't know.  
8 Q. Did Jeff Weiss help you or assist you  
9 in any way in these 1031 Exchanges?  
10 A. No.  
11 Q. How about Mike Shiffman?  
12 A. No.  
13 Q. You just did them on your own?  
14 A. I had an Accommodator.  
15 Q. Who was your Accommodator?  
16 A. WAMU.  
17 Q. WAMU. Okay. Is that the same  
18 Accommodator that helped out the other Plaintiffs  
19 in this case?  
20 A. Yes.  
21 Q. And that Accommodator, do you remember  
22 her name, just offhand?  
23 A. Erika O'Leary.  
24 Q. And she is located out of California;  
25 is that right?

1 A. Yes.  
2 Q. Where at in California?  
3 A. I think she's in Walnut Creek.  
4 Q. Is she still with WAMU?  
5 A. No, she's not with WAMU.  
6 I can't remember the name of the new  
7 entity that she's with.  
8 Q. Okay. Do you have -- do you recall  
9 there being documents that you would have signed  
10 or that would have been at issue in order to  
11 facilitate a 1031 Exchange?  
12 A. I'm not understanding "at issue".  
13 Q. Let's start with tax records.  
14 Were there particular tax records or  
15 tax documents, forms that you had to fill out in  
16 order to effectuate the 1031 Exchange?  
17 A. There were forms that she would have  
18 prepared.  
19 Q. Do you have copies of those?  
20 A. I'm sure that I do.  
21 Q. Okay. Did you maintain a 1031 file  
22 that would have documents in that file relating  
23 to this 1031 Exchange?  
24 A. I have documents from the sale of the  
25 relinquished properties and from the purchase of

1 the Curlew property.  
 2 Q. Other than the car dealership in  
 3 Mississippi and the apartment building in  
 4 Oakland, were there any other properties which  
 5 you exchanged as part of a 1031 Exchange for  
 6 acquiring the 1675 Curlew property?  
 7 A. That I, personally, did?  
 8 Q. Yes.  
 9 A. No.  
 10 Q. Okay. Do you have any remaining  
 11 ownership in the car dealership or the apartment  
 12 building?  
 13 A. No.  
 14 Q. After you found out about this  
 15 investment opportunity in Idaho Falls from Tom,  
 16 do you recall what you did to consider whether it  
 17 would be a good investment for you to make,  
 18 personally, with your own assets?  
 19 A. Tom dealt with the agents and with the  
 20 purchase.  
 21 He and I spoke during the period that  
 22 we were purchasing the property, but I was not  
 23 involved with the purchase.  
 24 Q. Okay. When you say you weren't  
 25 involved with the purchase, what do you mean by

1 agent, I was -- I was involved in the purchase.  
 2 Q. Okay. So, when we say -- or when you  
 3 testify that you weren't involved in this -- in  
 4 the purchase of the transaction involving  
 5 purchasing the 1675 property --  
 6 You understand when I say the 1675  
 7 property, I'm talking about the property here in  
 8 Idaho Falls that's the subject of the litigation  
 9 here.  
 10 A. I do.  
 11 Q. When you testify that you weren't  
 12 involved with that, do you mean that you didn't  
 13 have contact with Jeff Needs?  
 14 A. I may have received e-mails. I don't  
 15 recall initiating conversation with him --  
 16 Q. Okay.  
 17 A. -- regarding this purchase.  
 18 Q. Nothing stands out in your mind?  
 19 A. Not that I recall.  
 20 MR. CROCKETT: Kevin, you may want to  
 21 speak up a little bit for Rainey's benefit.  
 22 THE WITNESS: I'm sorry.  
 23 (A discussion was held off the record.)  
 24 BY MR. ARMSTRONG:  
 25 Q. You were present for your sister's

1 that?  
 2 A. I wasn't involved.  
 3 I don't know what -- maybe you could  
 4 ask another question.  
 5 Q. Sure. Maybe that's more of a vague  
 6 question.  
 7 What were you doing -- let's back up  
 8 and look at the Alabama investments.  
 9 I believe there was a Park Place Tower  
 10 or some sort of a commercial office building that  
 11 was being invested in by the San Francisco  
 12 Residence Club; is that right? In Alabama.  
 13 A. There were properties in Alabama that  
 14 were being considered.  
 15 Q. And you were looking at those to also  
 16 invest in personally?  
 17 A. Not personally.  
 18 Q. Not personally. Okay. But as the San  
 19 Francisco Residence Club?  
 20 A. Correct.  
 21 Q. Were you involved in those  
 22 transactions?  
 23 A. Yes.  
 24 Q. Okay. How were you involved?  
 25 A. I went to Alabama, I talked with the 700

1 deposition in San Francisco, correct?  
 2 A. That's correct.  
 3 Q. Do you remember her testifying that her  
 4 role in the purchasing of the 1675 property was  
 5 more of a back-seat role? Do you remember that  
 6 testimony from her?  
 7 A. I do remember that.  
 8 Q. Would you characterize your role in  
 9 this transaction similarly?  
 10 A. I believe she had some involvement or  
 11 knowledge that I did not have.  
 12 Q. Well, I'm asking for what -- how you  
 13 would characterize your role in this transaction.  
 14 Would you characterize your role in  
 15 this transaction similar to how Ms. O'Shea --  
 16 Anne O'Shea characterized her role?  
 17 A. No.  
 18 Q. So, you wouldn't characterize your role  
 19 as being a back-seat role?  
 20 A. I was not involved with the  
 21 transaction.  
 22 I don't know what back-seat means.  
 23 Q. Okay. And that may be --  
 24 A. But that is different than what I  
 25 recall Anne said in her deposition.

1 Q. Okay. I want to focus on you and what  
2 it was that you knew or what you considered in  
3 entering into this transaction, this purchase of  
4 the property here in Idaho Falls.

5 Prior to closing -- and we've already  
6 talked about that occurring approximately the  
7 middle of December 2007.

8 Prior to that closing date, do you  
9 recall reviewing any financial information  
10 related to the tenant?

11 A. I don't.

12 Q. Do you recall looking at any tax  
13 returns of the tenant?

14 A. I don't.

15 Q. Do you recall looking at any Profit and  
16 Loss statement of the tenant?

17 A. I don't.

18 Q. Did you have any contact with the  
19 tenant?

20 A. I did not.

21 Q. Did you have any contact with Mr. Needs  
22 relating to the financial condition of the  
23 tenant?

24 A. I may have been copied on an e-mail. I  
25 don't recall it at this point.

1 had asked him to look for other investment  
2 opportunities that you would be interested in  
3 potentially?

4 A. It wouldn't be that formal. We're a  
5 close family. We have investments together.  
6 We've done business together.

7 Q. Okay.

8 (Exhibit No. 1 marked.)

9 BY MR. ARMSTRONG:

10 Q. I'm handing you a document that we've  
11 marked as Exhibit 1 to your deposition.

12 Can you identify that for me, please?

13 A. Can I identify it?

14 Q. What is it?

15 A. It looks like the lawsuit that we have  
16 against your clients.

17 Q. Is it -- if you look on the right-hand  
18 side of that first page after that vertical line  
19 that goes through the middle of the page, it  
20 says: Plaintiff John Kevin Donahue's Responses  
21 to Defendant High Mark Development, LLC's First  
22 Set of Interrogatories.

23 A. Yes, I see that.

24 Q. Request for Production of Documents and  
25 Things and Requests for Admission?

1 Q. Nothing stands out in your mind?

2 A. Nothing does.

3 Q. Okay. Help me understand how -- did  
4 you know that, prior to your being contacted  
5 about a property in Idaho Falls, where your  
6 investment was being sought? Did you know that  
7 properties were being looked at or investment  
8 opportunities were being looked at by Mr. O'Shea  
9 on his own?

10 A. "On his own," I'm not following.

11 Q. Well, did you know that he was looking  
12 for an investment opportunity in Idaho?

13 A. Yeah, I believe that I did know that he  
14 had some interest or that -- that he had a  
15 contact in Idaho.

16 Q. Okay. Was this prior to you being  
17 notified by Mr. O'Shea that there was an  
18 investment opportunity in Idaho?

19 A. That I knew --

20 Q. That he had a contact in Idaho and that  
21 he was --

22 A. Yes, I knew prior to that that he had a  
23 contact -- an acquaintance in Idaho.

24 Q. Okay. Did you have an agreement with  
25 Mr. O'Shea, either verbal or written, where you 701

1 A. Yes.

2 Q. Did I read that correctly?

3 A. Yes.

4 Q. If you look -- do you remember  
5 filling -- or answering questions in writing when  
6 this case first --

7 A. Yes.

8 Q. Shortly after this case was filed?

9 A. Yes.

10 Q. If you'll look back to Page 19.

11 And the page numbers are there on the  
12 bottom of each page.

13 Do you recognize Mr. Crockett's  
14 signature there?

15 A. I see it, yes.

16 Q. If you'll turn the page to the next  
17 page, is that your signature?

18 A. Yes, it is.

19 Q. It states there that you were sworn,  
20 you were under oath, that you had read the  
21 Answers to Defendants' First Set of Discovery,  
22 that you knew the contents of the document and  
23 that you believed the facts were true as stated.

24 A. Yes.

25 Q. Okay. So, you remember being under



F

702

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT STATE OF IDAHO, COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas )  
and Anne O'Shea Trust u/d/t DATED )  
NOVEMBER 2, 1998; GRANDVIEW ) Consolidated  
CREDIT, LLC, a California Limited ) Case No.  
Liability Company; CALEB FOOT, an ) CV-08-4025  
individual; KATE LARKIN DONAHUE, )  
an individual; JOHN KEVIN )  
DONAHUE, an individual; and SAN )  
FRANCISCO RESIDENCE CLUB, INC., a )  
California Corporation, )

Plaintiffs, )

vs. )

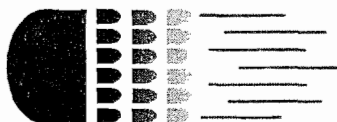
HIGH MARK DEVELOPMENT, LLC, an )  
Idaho Limited Liability Company; )  
GORDON ARAVE, individually and as )  
Officer of High Mark Development, )  
LLC; BENJAMIN D. ARAVE, )  
individually and as Officer of )  
High Mark Development, )

Defendants. )

**DEPOSITION OF KATE LARKIN DONAHUE**

Thursday, September 24, 2009, 1:03 P.M.

Idaho Falls, Idaho



**T&T REPORTING**

CERTIFIED SHORTHAND REPORTERS

**COPY**

REPORTED BY:

M. Rainey Stockton  
CSR 746

PREPARED FOR:

**703**

Mr. Armstrong

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DEPOSITION OF KATE DONAHUE - 09/24/09

SHEET 5 PAGE 17

1 A. No, we had a hotel license. We were  
2 always operating as a hotel, but because we had  
3 different arrangements, people would stay for  
4 different lengths of time.

5 **Q. When was that building acquired?**

6 A. It was acquired in December of 1975.

7 **Q. '75?**

8 A. Yes.

9 **Q. And when was it sold?**

10 A. July of 2007.

11 **Q. And was it your father that had**  
12 **acquired it back in 1975?**

13 A. My father and my mother.

14 **Q. Who was your father?**

15 A. John F. Donahue.

16 **Q. And he has since deceased; is that**  
17 **right?**

18 A. Correct.

19 **Q. When did he pass away?**

20 A. He died in the year 2000.

21 **Q. And the building was sold, then, in**  
22 **2007 -- July of 2007?**

23 A. Correct.

24 **Q. Who handled the sale of that property?**

25 A. Our Real Estate agent was named -- is

PAGE 19

1 **sell the hotel?**

2 A. About a year before.

3 **Q. Was there a reason why the decision was**  
4 **made to sell it?**

5 A. The reason was the economy, the loss of  
6 our business.

7 We relied on many English language  
8 schools. After 911, the student Visas were not  
9 available to many of the people that we had been  
10 having as guests before.

11 The business company -- not company --  
12 the business climate in San Francisco had changed  
13 dramatically and there weren't as many people --  
14 new people coming to the city for jobs.

15 And it also -- the tourist business in  
16 San Francisco had fallen sharply.

17 And we had operated the Residence Club  
18 for many, many years and we just thought it  
19 was -- it was a very valuable real estate asset  
20 and it was time to sell.

21 **Q. So, it was losing money. Is that a**  
22 **fair statement?**

23 A. It wasn't making money.

24 **Q. Okay. So, the decision was made to**  
25 **sell.**

PAGE 18

1 named John McInnery; company, Alan Panell.

2 **Q. How do you spell John McInnery?**

3 A. J-O-H-N.

4 And the McInnery -- this is a guess --  
5 M-C, capital I, N-N-E-R-Y.

6 **Q. Is he in San Francisco?**

7 A. Yes.

8 **Q. You mentioned somebody by the name of**  
9 **Alan.**

10 A. That's the name of the realty.

11 **Q. I see. Can you give that to me again,**  
12 **please?**

13 A. It sounds like Alan Panell.

14 **Q. Do you know how to spell Panell?**

15 A. No.

16 **Q. Okay. And that was the Real Estate**  
17 **agent or agency?**

18 A. Agency, yes.

19 **Q. And John McInnery, he was the one --**  
20 **the agent that was the actual person on-site who**  
21 **was handling that transaction on behalf of the**  
22 **San Francisco Residence Club?**

23 A. Correct.

24 **Q. When was it decided by the San**  
25 **Francisco Residence Club, as a corporation, to**

PAGE 20

1 A. Yes.

2 **Q. And how long did it take to sell the**  
3 **hotel?**

4 A. Approximately, a year.

5 **Q. Okay. And what was the final sales**  
6 **price of the hotel?**

7 A. 10.4.

8 **Q. And at the time of that sale, who were**  
9 **the shareholders of the San Francisco Residence**  
10 **Club?**

11 A. The shareholders; myself, Kate Donahue;  
12 Kevin Donahue; Anne O'Shea; and Gwen Donahue.

13 **Q. And did each of these shareholders that**  
14 **you listed for me own equal shares in the entity?**

15 A. No.

16 **Q. What was the proportion of shares owned**  
17 **by each individual?**

18 A. 116.

19 **Q. So, Kate, yourself --**

20 A. Yes.

21 **Q. -- you owned --**

22 A. 116.

23 **Q. 116 shares?**

24 A. Yes.

25 **Q. And what percentage was that of all**

DEPOSITION OF KATE DONAHUE - 09/24/09

SHEET 12 PAGE 45

1 A. One month.  
2 Q. And when did you go to France? When  
3 did you start that trip?  
4 A. Mid-October.  
5 Q. Okay. So, mid-October 2007. When did  
6 you return?  
7 A. Mid-November.  
8 Q. So, would it have been after November  
9 12, 2007?  
10 A. Yes.  
11 Q. Did you have any communications --  
12 Where were you in France? Did you just  
13 travel around the country?  
14 A. Yes.  
15 Q. Were you with anyone?  
16 A. Yes.  
17 Q. Who were you with?  
18 A. Brenda DeLuca.  
19 Q. Is she a family member? Friend?  
20 A. Friend.  
21 Q. Anybody else that you were with?  
22 A. No.  
23 Q. And was it just a vacation? Or was  
24 there some business involved with it?  
25 A. No business. Vacation.

PAGE 46

1 Q. Did you communicate with anyone -- any  
2 of your family members during this vacation to  
3 France?  
4 A. Yes.  
5 Q. Who did you communicate with from your  
6 family?  
7 A. I'm not sure who I communicated with,  
8 but I had e-mails. So, I'd check my e-mail  
9 periodically.  
10 Q. What e-mail account was that?  
11 A. KLDPROP -- and I don't know if it was  
12 Yahoo or G-mail because I switched at some point.  
13 Q. So, it's either one of those two.  
14 A. Yes.  
15 Q. Do you still have that e-mail account?  
16 A. Only the G-mail.  
17 Q. All right. And asked another way: Do  
18 you still have the e-mail account or access to  
19 the e-mails that you were receiving and sending  
20 in the middle of October 2007 to the middle of  
21 November 2007?  
22 A. I think so.  
23 Q. It's either in a G-mail or a Yahoo  
24 account?  
25 A. Uh-huh. (Yes)

705

PAGE 47

1 Q. Is that a yes?  
2 A. Yes, that is correct.  
3 Q. Did you have -- did any of those  
4 e-mails or other communications with family  
5 during your trip to France relate to or pertain  
6 to a possible investment opportunity in Idaho  
7 Falls?  
8 A. I don't remember at this time.  
9 Q. Did any of those e-mails deal with  
10 communications relating to investments in  
11 Alabama?  
12 A. I don't remember what they pertained  
13 to. I know I had e-mail communication.  
14 I was on vacation and was not getting  
15 very much business communication.  
16 Q. Okay. How many times do you remember  
17 checking your e-mails, either to send or to  
18 receive during your trip?  
19 A. Once a week.  
20 Q. Once a week. So, four times while you  
21 were there?  
22 A. Yes.  
23 Q. Did you come straight back home after  
24 France?  
25 A. Yes.

PAGE 48

1 Q. Did you go on any vacations soon  
2 thereafter?  
3 A. November to -- yes, we went to Hawaii  
4 as a family in February of 2008.  
5 Q. Okay. Prior to closing, which I'll  
6 represent to you was December 12, 2007 -- prior  
7 to that time, the only vacation that you had  
8 taken near that time was the trip to France?  
9 A. That's correct.  
10 Q. And then after that, the family went to  
11 Hawaii?  
12 A. Yes.  
13 Q. When you say the family went to Hawaii,  
14 which family members?  
15 A. Kevin Donahue, Anne and Tom O'Shea and  
16 their children.  
17 Q. Okay. I want to go to Exhibit No. 1 on  
18 that second page where the different topics of  
19 examination are set forth.  
20 If look at Paragraph 4, you've been  
21 assigned or appointed to be --  
22 A. Could you point to --  
23 Q. I'm sorry, Paragraph Number 4.  
24 A. Oh, Number 4. Okay.  
25 Q. You've been designated as a competent

1 was the explanation we were given.

2 Q. Okay. Was that the only time that you  
3 remember the issue of the tenant's financial  
4 condition being a question in your mind?

5 A. No.

6 Q. Prior to closing.

7 A. No.

8 Q. Did you have other concerns that arose  
9 about the tenant's financial condition  
10 independent of the tax returns?

11 A. Yes.

12 Q. What gave you that concern or what  
13 triggered that concern?

14 A. We wanted to have a tenant that was  
15 going to be paying their rent.

16 We had a lease that we had read that  
17 said that this was going to be in effect until  
18 2016. We were looking forward to that, to have a  
19 long-term tenant.

20 And the payment of rent, plus the CAM  
21 charges made that attractive to us.

22 So, I was concerned about the -- what  
23 the terms of the lease were.

24 Q. Were your concerns about the specific  
25 terms relating to an option as well as what was

1 all the way through 2016?

2 A. No. The tenant was presented to us as  
3 a very good tenant, and that this was a good  
4 business and a good location.

5 I had gone on the internet on Google  
6 and Googled the Children's Center and saw their  
7 web site and the type of facility it was and the  
8 type of work that went on there.

9 Plus they had a second location that  
10 they owned -- not that they owned -- that they  
11 operated in Pocatello doing the same thing. I  
12 was very impressed that they had two locations.

13 The number of doctors they had, the  
14 type of service they were providing to this  
15 community.

16 And I was very, very interested in  
17 having a single tenant that appeared to be so  
18 successful.

19 Q. Okay. Did you do anything else with  
20 these tax returns after you looked at them, when  
21 you looked at them initially, which caused you  
22 concern about needing more information?

23 A. Did I do anything else other than have  
24 Jeff contact Paul Fife?

25 Q. Correct.

1 considered to be a Triple Net under the lease?

2 A. Yes.

3 Q. Did the length of the term concern you  
4 as to the viability of the tenant, whether it  
5 would endure up until 2016? Was that ever a  
6 concern of yours?

7 A. The length of the lease?

8 Q. Correct.

9 A. That was attractive to us.

10 Q. Right. But was it ever a concern? I  
11 mean, with the option, the Triple Net aspect,  
12 those concerns that you had in the lease, did  
13 that -- was there an additional concern about the  
14 length of the lease with the tenant?

15 A. The length of the lease was attractive  
16 to us. We liked that there were eight years left  
17 on it and that the rent --

18 Ask me the other parts of the question,  
19 please.

20 Q. Well, I think you've answered my  
21 question. Maybe I need to ask the question a  
22 little more specifically.

23 Was it ever a question in your mind or  
24 a concern related to the tenant being able to  
25 stay in the building and make its rent payments

1 A. No.

2 Q. Did you review -- and I'm talking about  
3 you, personally, or the San Francisco Residence  
4 Club -- did either of those entities or  
5 individuals examine any other financial  
6 information of the tenant other than the tax  
7 returns that you've testified to today?

8 A. You've asked if I did? The San  
9 Francisco Residence Club? Or anyone else?

10 Q. No, just the San Francisco Residence  
11 Club, as an entity; and you, yourself,  
12 individually.

13 A. Did I -- I'm sorry, I'm getting lost  
14 here. Ask that again.

15 Q. Well, let's break it up so it's not a  
16 compound question.

17 With regard to you, specifically as an  
18 individual, did you review any other financial  
19 information of the tenant other than the four  
20 pages of tax returns prior to closing?

21 A. No.

22 Q. Did the San Francisco Residence Club?

23 A. What do you mean by "other financial  
24 information"?

25 Q. A Profit and Loss Statement.

DEPOSITION OF KATE DONAHUE - 09/24/09

SHEET 18 PAGE 69

PAGE 71

1 A. No.  
2 Q. Any rent rolls or -- rent rolls?  
3 A. No.  
4 Q. Any receivable reports from the tenant?  
5 A. No.  
6 Q. Any balance sheets of the tenant?  
7 A. No.  
8 Q. So, it's your testimony -- as Kate  
9 Donahue, it's your testimony that the only  
10 financial information that you reviewed of the  
11 tenant prior to closing were the four pages of  
12 tax returns from '05 and '06.  
13 A. Correct.  
14 Q. Is that the same testimony with regard  
15 to the San Francisco Residence Club?  
16 A. Yes.  
17 Q. Okay.  
18 (Exhibit Nos. 4-5 marked.)  
19 BY MR. ARMSTRONG:  
20 Q. Handing you what's been marked as  
21 Exhibit 4, did you, Kate Donahue, prior to  
22 closing, review that document -- Exhibit 4 prior  
23 to closing?  
24 A. No.  
25 Q. Handing you what's been marked as

1 Q. How about the San Francisco Residence  
2 Club, did that entity view Exhibit 5 prior to  
3 closing?  
4 A. No, I don't recognize this.  
5 Q. Okay. Did -- strike that.  
6 A. I want to amend my answer. I have seen  
7 this Profit and Loss, but not prior to closing.  
8 I have seen this, but not prior to closing.  
9 Q. So, you're referring to Exhibit 4 of  
10 your deposition.  
11 A. Yes, the Profit and Loss. I have seen  
12 this. I was confused by your --  
13 Q. And, I'm sorry --  
14 A. -- question.  
15 Q. You saw -- you did see this document  
16 after closing.  
17 A. After closing.  
18 (Exhibit No. 6 marked.)  
19 BY MR. ARMSTRONG:  
20 Q. Okay. Handing you what's been marked  
21 as Exhibit 6 of to your deposition, do you  
22 recognize that document?  
23 A. No.  
24 Q. Did you, Kate Donahue, review that  
25 document prior to closing?

PAGE 70

PAGE 72

1 Exhibit 5 to your deposition -- well, strike  
2 that.  
3 Going back to Exhibit 4, do you  
4 recognize what Exhibit 4 is?  
5 The document before that, before  
6 Exhibit 5. I'm sorry?  
7 A. It says: The Children's Center Profit  
8 and Loss January 1 through June 7, 2007.  
9 Q. Did you -- when was the first time --  
10 strike that.  
11 When was the first time you saw Exhibit  
12 4?  
13 A. Right now.  
14 Q. Okay. You haven't seen it prior to  
15 today?  
16 A. (Witness shakes head negatively.)  
17 Q. Is that a no?  
18 A. No.  
19 Q. How about the San Francisco Residence  
20 Club?  
21 A. No.  
22 Q. Handing you what's been marked as  
23 Exhibit 5, have you ever seen Exhibit 5 prior to  
24 today? "You" being Kate Donahue.  
25 A. I don't recognize this.

1 A. No.  
2 Q. Did the San Francisco Residence Club  
3 review that document prior to closing?  
4 A. No.  
5 Q. Prior to closing, did you, Kate  
6 Donahue, review any Estoppel Certificates from  
7 the tenant?  
8 A. I did see an Estoppel Certificate from  
9 the tenant.  
10 Q. And that was prior to closing?  
11 A. Yes.  
12 Q. Do you recall which Estoppel  
13 Certificate you looked at?  
14 A. I saw two.  
15 Q. Okay. Handing you what was marked as  
16 Exhibit 3 to Kevin Donahue's deposition. And  
17 there is an Exhibit D attached to that exhibit.  
18 Do you recognize that as being one of  
19 the Estoppel Certificates that you reviewed prior  
20 to closing?  
21 A. October 17th. I think this is the one  
22 where the options were removed. Is that correct?  
23 Q. Yeah. If you look at -- after  
24 Paragraph 1 of this Exhibit D to Exhibit 3 of  
25 Kevin Donahue's deposition, I think that's the

707

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708

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT STATE OF IDAHO, COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas )  
and Anne O'Shea Trust u/d/t )  
DATED NOVEMBER 2, 1998; GRAND- )  
VIEW CREDIT, LLC, a California )  
limited liability company, )  
CALEB FOOT, an individual, )  
KATE LARKIN DONAHUE, an )  
individual, JOHN KEVIN DONAHUE, ) Consolidated  
an individual, and SAN ) Case No: CV-08-4025  
FRANCISCO RESIDENCE CLUB, INC., )  
a California corporation, )

Plaintiffs )

VS. )

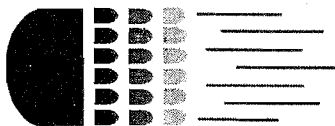
HIGH MARK DEVELOPMENT, LLC, an )  
Idaho limited liability company; )  
GORDON ARAVE, individually and )  
as Officer of High Mark )  
Development, LLC; BENJAMIN D. )  
ARAVE, individually and as )  
Officer of High Mark Development )

Defendants. )

DEPOSITION OF CALEB FOOTE

Tuesday, September 29, 2009, 10:00 a.m.

Idaho Falls, Idaho



T&T REPORTING

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RMR, RPR, CSR

PREPARED FOR: Mr. Armstrong

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DEPOSITION OF CALEB FOOTE - 09-29-09

SHEET 2 PAGE 5

1 Q And what is your date of birth?

2 [REDACTED]

3 Q That makes you how old?

4 A I will be 66 this November.

5 Q And what is your relationship -- do you  
6 have any familial relationship with any of the other  
7 plaintiffs in this case?

8 A No, I do not.

9 Q And who do you know out of the  
10 plaintiffs.

11 A Tom O'Shea and Anne O'Shea are good  
12 friends of mine and neighbors down the block. And I  
13 have known them for about ten years. I met Jack  
14 Chillemi through the O'Shea's and have known Jack  
15 for several years.

16 And I met Kate Donahue and Kevin  
17 Donahue through Anne and Tom.

18 Q Prior to the investment in the 1675  
19 property here in Bonneville County did you know Kate  
20 and or Kevin Donahue?

21 A I may have met them at the house, but I  
22 was not -- we were not you know friends.

23 Q Have you ever had your Deposition  
24 taken?

25 A I have.

PAGE 7

1 Q The only differences is that he is not  
2 here to rule on any objections that may be raised to  
3 some of the questions that I ask of you as well as  
4 some of the documents that I am going to present to  
5 you as an exhibit.

6 The court reporter here, Karla, is  
7 taking down everything that you and I are saying.  
8 Our responses with each other, the questions and  
9 answers need to be verbal.

10 Try to avoid head shakes and head nods  
11 because Karla --

12 A I understand.

13 Q -- Karla needs to get the answer.

14 A I understand.

15 Q So we don't want to leave it up to  
16 interpretation as to what you were meaning when you  
17 shook your head --

18 A I understand.

19 Q -- or said Uh-huh or Huh-hu. So if you  
20 can -- try to remember some of the -- remember those  
21 ground rules, I would appreciate it. Are you under  
22 the influence of any medication that would impair  
23 your ability to recall events?

24 A No.

25 Q I am going to ask you questions that

PAGE 6

1 Q When was that?

2 A I don't recall exactly. It was  
3 probably 25 years ago.

4 Q What kind of a case?

5 A It was a medical malpractice case.

6 Q And were you a party or a witness?

7 A I was a party to that.

8 Q And were the plaintiff or the  
9 defendant?

10 A I was the defendant.

11 Q And were you a doctor by then by  
12 practice?

13 A I am a doctor.

14 Q What kind of a doctor?

15 A I am an emergency medicine physician.

16 Q Let's go through some of the ground  
17 rules of giving a deposition since it has been --

18 A A long time.

19 Q -- a few years since you've had your  
20 deposition taken.

21 As you know you have been put under  
22 oath to testify truthfully just as if we were  
23 sitting in court in front of Judge Tingey in this  
24 case.

25 A Yes.

710

PAGE 8

1 extend back into the 2007 time period which is  
2 roughly two years ago. You don't have any --

3 A Yes, you may ask those questions.

4 Q You don't have any difficulty recalling  
5 events of two years ago?

6 A No.

7 Q Do you have any medical condition that  
8 would prevent you from remembering events?

9 A No, I do not.

10 Q Okay. Are you a party in any other  
11 litigation other than the case where we're taking  
12 your deposition today?

13 A No, I am not.

14 Q Okay. Give me your highest level of  
15 education.

16 A Graduated from Case Western Reserve  
17 Medical School in 1970.

18 Q That is in Cleveland?

19 A Cleveland, Ohio.

20 Q Okay. And since then have you been  
21 practicing as a physician?

22 A That's correct.

23 Q Are you now retired?

24 A I am now retired.

25 Q When did you retire?

1 A I retired November 3rd of 2003.  
 2 Q Did you practice -- did you do most of  
 3 your work, most of your practice in the Berkeley  
 4 area?  
 5 A I practiced for thirty years at Kaiser  
 6 Permanente Medical Center in Hayward, California.  
 7 Q Where is Hayward?  
 8 A Hayward is approximately 15 miles south  
 9 of Oakland.  
 10 Q Prior to investing in the 1675  
 11 property, had you had experience in investing in  
 12 commercial real estate?  
 13 A No, I had not.  
 14 Q Was this your first experience in  
 15 investing in commercial real estate?  
 16 A Yes, it was.  
 17 Q Okay. How did you find out about the  
 18 investment property, if you will, here in Idaho?  
 19 A I believe I was having dinner with Tom  
 20 and Anne O'Shea. Tom asked me whether I would be  
 21 interested in joining a small group on a very  
 22 promising investment in Idaho Falls, Idaho.  
 23 Q Okay. And do you remember the date of  
 24 that dinner?  
 25 A No, I do not. It was -- As I recall it

1 was probably in the early summer, maybe late summer  
 2 of 2007.  
 3 Q Okay. Who was present at that dinner?  
 4 A I believe it was only the O'Shea's and  
 5 myself.  
 6 Q I don't know if I asked you this: But,  
 7 are you married?  
 8 A Yes.  
 9 Q Do you have children?  
 10 A I do have two children.  
 11 Q What are their ages?  
 12 A I have a daughter who is 39 years old.  
 13 And I have a son who is 37 years old.  
 14 Q Okay. And you are still married?  
 15 A I am on my second marriage. These  
 16 children are from my first marriage.  
 17 Q Okay. And how long have you been  
 18 married to your second wife?  
 19 A We have been together for 20 years. We  
 20 have been legally married for seven years.  
 21 Q Okay. Going back to this dinner in the  
 22 summer of 2007 where you and the O'Shea's were  
 23 present, was your wife present with you?  
 24 A I do not recall -- I do not recall  
 25 whether she was present.

711

1 Q And were you having dinner with the  
 2 O'Shea's specifically for purposes of talking about  
 3 this investment opportunity?  
 4 A No.  
 5 Q Was it just a friendly get-together?  
 6 A It was just a friendly neighborhood get  
 7 together.  
 8 Q Give me your fullest recollection of  
 9 what was said at that time about this investment  
 10 opportunity.  
 11 A I believe Tom thought this was a very  
 12 solid investment. He mentioned that it was a 2000  
 13 square foot medical building in Idaho Falls that had  
 14 a ten-year lease and a triple net lease. That it  
 15 had a great income, with good positive cash flow;  
 16 and that we could expect a seven to eight percent  
 17 return on the investment.  
 18 Q He told you this in this meeting in the  
 19 summer of 2007?  
 20 A That's correct.  
 21 Q Did Anne say anything about the  
 22 investment?  
 23 A I don't believe that she talked about  
 24 it at all. I am not sure whether anne had seen the  
 25 building by that time or not. I think this was

1 probably in the preliminary stages when Tom was  
 2 meeting with Jeff Needs. I am not sure whether that  
 3 was before or after Tom had come to Idaho to explore  
 4 the building.  
 5 Q Did he show you any documents in that  
 6 meeting or in that dinner party?  
 7 A No.  
 8 Q So, he did not have a proforma?  
 9 A Not at that time.  
 10 Q Okay. What was the end result of the  
 11 meeting with the O'Shea's that evening?  
 12 A The end recall was that Tom said if I  
 13 was interested in putting some money into the  
 14 deal -- they were looking for a small investor such  
 15 as myself. And that if I wanted to put in a hundred  
 16 dollars or fifty thousand or a hundred thousand,  
 17 that would be fine.  
 18 And if I was interested we could talk  
 19 about it in the future.  
 20 Q And did you make any kind of a decision  
 21 at the dinner party?  
 22 A No, I did not.  
 23 Q When was it that you decided then to  
 24 invest some money into this property? When I say  
 25 "this property", I am talking about the 1675

DEPOSITION OF CALEB FOOTE - 09-29-09

SHEET 8 PAGE 29

PAGE 31

1 A 1675, yes.  
2 Q Okay.  
3 A And that this was part of the move  
4 from -- in 2006, from I guess, what, 619 Curlew --  
5 Q 619.  
6 A 619 -- whatever previous building they  
7 were in. That was part of the expenses that were  
8 incurred in moving into the new building and  
9 expanding their practice.  
10 Q Okay. Was that -- when you talked  
11 about the expenses and what the reason for the  
12 increase in expenses was, was that prior to closing  
13 or was that after closing; do you remember?  
14 A I think this was a discussion that we  
15 had prior to closing.  
16 Q A discussion about expenses?  
17 A Yes. I remember just taking it in face  
18 value. I am not an accountant nor an attorney. I  
19 don't -- I am not experienced in commercial real  
20 estate.  
21 I took Tom's analysis of the tax  
22 information, and I don't think I thought about it  
23 again.  
24 Q Okay. You trusted him implicitly?  
25 A Yes.

1 A I had never met Jeff.  
2 Q Had you ever met Jeff prior to closing?  
3 A I've never met Jeff.  
4 Q Did you ever talk to him prior to  
5 closing?  
6 A I don't believe I have ever talked to  
7 him directly.  
8 Q How about indirectly?  
9 A We may have had a conference call or  
10 two sometime between August and closing of 2007, but  
11 I don't recall any specific conversations.  
12 Q Okay. So there may have been one or  
13 two conference calls that you had where Jeff Needs  
14 was present prior to closing?  
15 A You mean present on the other end of  
16 the telephone?  
17 Q On the other end of the phone.  
18 A I think that is probably the case.  
19 Q Okay. Do you recall when that  
20 conference call was?  
21 A I do not.  
22 Q Who else would have been present on  
23 that conference call?  
24 A It may have been John -- or Kevin  
25 Donahue. Kate may have been involved with it. Jack

PAGE 30

1 Q I think that was your testimony  
2 earlier?  
3 A Yes.  
4 Q Was there a reason -- since we're on  
5 that issue, why did you trust him implicitly?  
6 A He is an honest, dear, close friend of  
7 mine. I would trust him with my life. And I would  
8 trust my family with his judgement and care. He is  
9 a wonderful human being.  
10 Q Did your trust of Mr. O'Shea extend  
11 also to Jeff Needs?  
12 A I had never met Jeff Needs. The fact  
13 that Tom respected Jeff Needs and trusted him was  
14 enough for me.  
15 Q How did you know that he respected Jeff  
16 Needs?  
17 A He just said he had this -- I guess he  
18 described Jeff as a friend and somebody he knew, and  
19 seemed like an upright citizen.  
20 Q Did you assume from that that Tom  
21 respected Jeff?  
22 A I assumed that to be the case.  
23 Q So you're saying that Tom respected  
24 Jeff was not necessarily something that Jeff told  
25 you was -- or specifically told you --

PAGE 32

1 may have been involved with it. Tom O'Shea. I  
2 can't recall who was at various different conference  
3 calls since we had many.  
4 And so some of us were present and  
5 some of us were not. I was gone for a large portion  
6 of that time before the closure of this transaction.  
7 Q Well, let's go back. I think your  
8 answer had a number of aspects to it. Let's go to  
9 the aspect of what you said as far as you not being  
10 present. Were you on vacation during this time  
11 period?  
12 A Yes.  
13 Q Where were you?  
14 A I was in Southwest Harbor, Maine.  
15 Q When were you on vacation in Maine?  
16 A I think probably from the middle of May  
17 through early September with several trips back to  
18 the Bay area approximately on an every  
19 three-or-four-week interval.  
20 Q Between mid-May 2007 through early  
21 September 2007, you were more or less --  
22 A Commuting back and forth.  
23 Q You were spending most of your time in  
24 Maine?  
25 A That's correct.

1 A I was there the majority of the time.  
 2 I think my wife joined me for approximately four  
 3 weeks out of that time.  
 4 Q Okay. When you received Exhibit 3 to  
 5 your deposition, did you read it?  
 6 A I think I looked through the numbers.  
 7 Q Okay. Did anything stand out to you?  
 8 A No.  
 9 Q Did you draw any conclusions or ask any  
 10 questions about a deficit balance?  
 11 A No, I did not.  
 12 Q Did you notice that when you --  
 13 A I did not think I really understood  
 14 what that meant.  
 15 Q Okay. Did you ask Mr. O'Shea or  
 16 Mr. Needs to clarify it?  
 17 A I don't think I did.  
 18 Q Okay. Would you consider Exhibit 3 to  
 19 be a document that you would have relied on in  
 20 deciding to purchase the property?  
 21 A I don't know whether I understood any  
 22 special specific about this document.  
 23 Q So the answer to my question is no?  
 24 A No.  
 25 MR. ARMSTRONG: Okay.

1 analysis on your own about whether this would be an  
 2 investment that you would want to make?  
 3 A No.  
 4 Q Is there a reason why?  
 5 A No.  
 6 Q Is it because you just assumed that the  
 7 investigation --  
 8 MR. CROCKETT: Objection. He has  
 9 answered the question, Counsel.  
 10 THE WITNESS: I already assumed that  
 11 the investigation had been done to my  
 12 satisfaction by people who I respected and had  
 13 much more experience in evaluating these sorts of  
 14 transactions.  
 15 BY MR. ARMSTRONG:  
 16 Q Those people would have been Tom O'Shea  
 17 and or Jeff Needs?  
 18 A Yes.  
 19 Q Anybody else?  
 20 A No.  
 21 Q Okay. Do you recall reviewing --  
 22 we've looked at Exhibits 1, 2, 3 and 4 of your  
 23 deposition. And these documents appear to be  
 24 financial information related to The Children's  
 25 Center.

1 (Exhibit 4 marked)  
 2 BY MR. ARMSTRONG:  
 3 Q Handing you what was marked as Exhibit  
 4 4 to your deposition. Do you recognize that  
 5 document?  
 6 A Yes, I do. I have seen this before.  
 7 Q What is that?  
 8 A The Idaho Falls Children's Center rent  
 9 received.  
 10 Q Okay. Do you remember what the  
 11 circumstances were of your receiving this document?  
 12 A I don't recall. I remember receiving  
 13 this. And I think it was sometime during the fall  
 14 of 2007. Looked like all rents had been paid and  
 15 that the building maintenance, expenses and  
 16 everything else had been paid.  
 17 Q Do you remember receiving Exhibit 4  
 18 around the same time that you received Exhibit 3?  
 19 A I think it was sometime in the fall of  
 20 2007. I don't recall the exact time.  
 21 Q Okay. Do you recall if it was at or  
 22 near the time that you had received Exhibit 3 that  
 23 you had received Exhibit 4?  
 24 A I don't.  
 25 Q Did you ever do any independent

1 Would you agree with that?  
 2 A I would agree with that.  
 3 Q Okay. Was there any other financial  
 4 information that you had related to the tenant prior  
 5 to closing?  
 6 A I don't believe so.  
 7 Q Okay. So what we looked at in Exhibits  
 8 1 through 4 would be the totality of financial  
 9 documents that you would have had or received?  
 10 A I think -- this is what I recall  
 11 remembering. I don't know whether you would  
 12 consider the lease estoppel certificate another  
 13 financial document, but I also saw that.  
 14 Q Okay.  
 15 MR. CROCKETT: Just to correct the  
 16 record, Counsel, he said he did not see the  
 17 balance sheet which is included in the exhibit.  
 18 He saw two or three pages of each tax return.  
 19 BY MR. ARMSTRONG:  
 20 Q And that was your testimony, was it  
 21 not?  
 22 A That's correct.  
 23 Q As far as Exhibit 1 is concerned --  
 24 A As far as Exhibit 1 is concerned, I  
 25 don't think I saw the entire document. I saw two or

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas and )  
Anne O'Shea Trust u/d/t DATED )  
NOVEMBER 2, 1998; GRANDVIEW CREDIT, ) Case No.  
LLC, a California limited liability ) CV-08-4025  
company; CALEB FOOTE, an individual, )  
KATE LARKIN DONAHUE, an individual, )  
JOHN KEVIN DONAHUE, an individual, )  
and SAN FRANCISCO RESIDENCE CLUB, )  
INC., a California corporation; )

Plaintiffs, )

vs. )

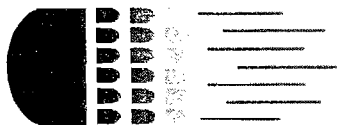
HIGH MARK DEVELOPMENT, LLC, an Idaho )  
limited liability company; GORDON )  
ARAVE, individually and as Member of )  
High Mark Development, LLC; JARED )  
ARAVE, individually and as Member of )  
High Mark Development, LLC; BENJAMIN )  
ARAVE, individually and as Member of )  
High Mark Development, LLC; and JOHN )  
DOES I-X, )

Defendants. )

DEPOSITION OF GORDON ARAVE

Thursday, January 29, 2009, 1:15 p.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

**COPY**

REPORTED BY:  
Sandra D. Terrill,  
RPR, CSR

715

PREPARED FOR:  
MR. ARMSTRONG

POST OFFICE BOX 51020  
IDAHO FALLS, IDAHO 83405

208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

SHEET 7 PAGE 25

1 date is?  
 2 A. June -- it says the 19th day of June  
 3 2006.  
 4 Q. Can we assume that's the date they  
 5 started occupancy of the building?  
 6 MR. ARMSTRONG: Objection. Foundation.  
 7 Calls for speculation.  
 8 THE WITNESS: I don't know for sure.  
 9 Q. BY MR. CROCKETT: Well, if it says the  
 10 commencement date, do you think it's fair enough to  
 11 assume that's when they occupied the property?  
 12 A. Sometime in that vicinity.  
 13 Q. But that's when the lease and the rent  
 14 payments started, correct, in accordance with the  
 15 document?  
 16 A. Well, let's see. What does it say?  
 17 It looks like that's correct, that the rent  
 18 commenced on June the 19th.  
 19 Q. So may we presume the building was  
 20 done and occupied, more or less, on that date?  
 21 A. I would expect so.  
 22 Q. Thank you. Can you hand that back to  
 23 me.  
 24 Do you know whether rent was paid in  
 25 accordance with the terms of your lease agreement

PAGE 26

1 for the months of June, July, and August 2006 in  
 2 accordance with that lease?  
 3 A. I was never involved in collecting  
 4 rent.  
 5 Q. Okay. Who would have been involved in  
 6 the collection of the rent on this property?  
 7 A. Probably Scott Williams.  
 8 Q. Now, who is Mr. Williams?  
 9 A. He works -- he is a member of High  
 10 Mark Development and he handles -- he does work in  
 11 my office and does handle some rental properties  
 12 for the various entities there.  
 13 Q. Okay. And is he an accountant and  
 14 kind of a bookkeeper, controller type?  
 15 A. He's not actually an accountant. He  
 16 has a degree in finance, business, and he does do  
 17 that sort of thing, yes.  
 18 Q. So may we presume that if somebody in  
 19 your organization, High Mark, was in charge of  
 20 collecting and keeping track of rents and all that,  
 21 that it would have been Mr. Williams?  
 22 A. It probably was.  
 23 Q. It apparently wasn't you; is that  
 24 right?  
 25 A. I -- no. I was not.

720

PAGE 27

1 Q. You don't do that?  
 2 A. No, not usually.  
 3 Q. All right. Now, you were, apparently,  
 4 the one that was responsible for listing the  
 5 property with Mr. Fife, correct?  
 6 A. I was.  
 7 (Exhibit \*-002 marked.)  
 8 Q. BY MR. CROCKETT: I'm going to show  
 9 you what's been marked Deposition Exhibit No. \*-002  
 10 and indicate to you that we took a previous  
 11 deposition in this case from Paul Fife, your real  
 12 estate agent, and he testified that this was an  
 13 advertisement and promotion that he ran on your  
 14 property at 1675 Curlew, Idaho Falls, and that this  
 15 was an Internet based promotion and ad that, in  
 16 fact, did prompt a response from Jeff Needs, a  
 17 Realtor representing the O'Shea Family Trust.  
 18 MR. ARMSTRONG: Objection. Foundation.  
 19 Assumes facts.  
 20 Q. BY MR. CROCKETT: Do you understand  
 21 that? I'm just representing to you that's been the  
 22 previous testimony of Mr. Fife.  
 23 A. I accept that.  
 24 Q. And do you know any information that  
 25 would be contradictory to that?

PAGE 28

1 A. I do not.  
 2 Q. Now, review the information provided  
 3 in the advertising and promotion. Is that  
 4 consistent with the facts existing as to that  
 5 property at the time you listed it?  
 6 A. It does look correct. It looks to me  
 7 to be a 10-foot-square-foot discrepancy between  
 8 this and something I read earlier.  
 9 Q. 10-foot-square-foot, what do you mean  
 10 by that?  
 11 A. It says building size 20,000 square  
 12 feet, and the previous one said 19,990, but I don't  
 13 know where that came from.  
 14 Q. You're referring to the lease?  
 15 A. Yeah.  
 16 Q. So that would be a 10-foot-square-foot  
 17 -- yeah, you're right. The lease says 19,990 and  
 18 this says 20-, right?  
 19 A. Other than that it looks to be correct  
 20 to me.  
 21 Q. Do you know who would have provided  
 22 the information that ended up in this promotion and  
 23 in this ad?  
 24 A. It could have been me. It may have  
 25 been Scott. But I knew Paul Fife personally so I

SHEET 8 PAGE 29

1 may have provided the information or answered  
 2 verbally.  
 3 **Q. Could it also have been your son Ben?**  
 4 A. That's unlikely.  
 5 **Q. I see. I see. Why do you say that?**  
 6 A. Because he doesn't live here.  
 7 **Q. I see. Did he live here in -- this**  
 8 **would have been June of '06?**  
 9 A. He did not.  
 10 **Q. Do you agree that you provided the**  
 11 **information -- or somebody in your organization.**  
 12 **You say it was likely you -- that there was a**  
 13 **10-year lease with an option to renew and that it**  
 14 **was a triple net lease?**  
 15 A. I'm sure that that lease was provided  
 16 by someone in my office and if I had been asked, I  
 17 would have answered that way, yes.  
 18 **Q. And do you agree with Mr. Fife's**  
 19 **statement when he says, property description: Here**  
 20 **is a great investment property with that hard to**  
 21 **find 10-year, triple net lease?**  
 22 A. I do agree.  
 23 **Q. Do you believe that that statement**  
 24 **would have been attractive to a prospective buyer?**  
 25 MR. ARMSTRONG: Objection. Foundation.

PAGE 30

1 Calls for speculation.  
 2 **Q. BY MR. CROCKETT: In your opinion?**  
 3 MR. ARMSTRONG: Same objection.  
 4 THE WITNESS: It says what it says. It  
 5 describes itself. A 10-year lease is an attractive  
 6 thing, yes.  
 7 (Exhibit \*-003 marked.)  
 8 **Q. BY MR. CROCKETT: I want to ask you --**  
 9 **I'm going to show you what's been marked as**  
 10 **Deposition Exhibit No. \*-003. Do you recognize**  
 11 **this? This seems to be a personal note from**  
 12 **M. Smith Enterprises, Matt Smith, manager,**  
 13 **promissory note in the amount of a hundred thousand**  
 14 **dollars payable to you, correct?**  
 15 A. That's correct.  
 16 **Q. Dated June 1st, 2005?**  
 17 A. That's correct.  
 18 **Q. Tell me what this is and tell me**  
 19 **whether or not it relates or not to your lease**  
 20 **arrangement.**  
 21 MR. ARMSTRONG: Objection. Compound.  
 22 Vague.  
 23 **Q. BY MR. CROCKETT: First of all,**  
 24 **Mr. Arave, I'll try to quit asking the compound**  
 25 **question. Your counsel has a point well taken.** 721

PAGE 31

1 **What is the document?**  
 2 A. It's a promissory note to me  
 3 personally for the amount of \$100,000 that was  
 4 obviously loaned to Matt Smith Enterprises and  
 5 signed by Mr. Smith.  
 6 **Q. Did you make a hundred thousand dollar**  
 7 **loan to that company?**  
 8 A. I did.  
 9 **Q. What were the circumstances?**  
 10 A. As I recall, I had known Mr. Smith for  
 11 some period of time by then, three or four years,  
 12 got along well with him. Frankly, had quite a bit  
 13 of confidence in him. He approached me and asked  
 14 me to loan him the money, and after some discussion  
 15 I did so.  
 16 **Q. So you actually wrote him a check or**  
 17 **gave him that amount of money?**  
 18 A. I did.  
 19 **Q. Did it have anything to do with your**  
 20 **lease arrangement on any building you had an**  
 21 **ownership interest in?**  
 22 A. None whatsoever.  
 23 **Q. Do you know what he used the money**  
 24 **for?**  
 25 A. Not specifically.

PAGE 32

1 **Q. But it was to his business rather than**  
 2 **to him personally?**  
 3 A. Well, it was to Matt Smith  
 4 Enterprises.  
 5 **Q. I see.**  
 6 A. And that is not his business name. So  
 7 he would have to sort that answer to you.  
 8 **Q. Don't you recall, though, that at some**  
 9 **point in time his business name changed, that is,**  
 10 **it started out being M. Smith Enterprises and then**  
 11 **flipped over and changed to be The Children's**  
 12 **Center, Incorporated?**  
 13 MR. ARMSTRONG: Objection, foundation.  
 14 THE WITNESS: I don't recall that. It may  
 15 be true, but I don't recall it. I knew Matt Smith  
 16 himself, but I didn't necessarily -- I wasn't  
 17 dealing with these names and times and, you know,  
 18 what he did there. I just knew Matt Smith.  
 19 **Q. BY MR. CROCKETT: All right. Do you**  
 20 **know whether this is a commercial loan or a**  
 21 **consumer personal loan?**  
 22 A. What's the difference?  
 23 MR. ARMSTRONG: I'm going to object. It's  
 24 been asked and answered.  
 25 **Q. BY MR. CROCKETT: Well, it's in the**



SHEET 15 PAGE 57

1 Q. BY MR. CROCKETT: I'm sorry. 1675.  
2 A. 1675.  
3 Q. The record will indicate that the  
4 subject property is at 1675 Curlew.  
5 A. That's what I would think this is,  
6 yes.  
7 Q. And do you also agree that the other  
8 entry for Crestwood Enterprises would have had  
9 specifically to do with the professional office  
10 building that you leased to The Children's Center  
11 in Pocatello?  
12 A. I believe so, yes.  
13 Q. It wouldn't relate to any other  
14 property, would it?  
15 A. No. I have none other down there.  
16 (Exhibit \*-010 marked.)  
17 Q. BY MR. CROCKETT: Handing you what's  
18 been marked as Deposition Exhibit No. \*-010. Do  
19 you recognize the document?  
20 A. Can't say as I do, but --  
21 Q. It comes from your office though,  
22 doesn't it, don't you agree?  
23 MR. ARMSTRONG: Objection, foundation.  
24 Q. BY MR. CROCKETT: Doesn't the top of  
25 the fax indicate that it was faxed --

PAGE 59

1 Calls for speculation.  
2 THE WITNESS: I don't know where that came  
3 from.  
4 MR. ARMSTRONG: Can you answer his  
5 question?  
6 THE WITNESS: I can't. I don't know.  
7 Q. BY MR. CROCKETT: Can you do the math?  
8 A. Well, I could if you have a  
9 calculator. Give me a calculator.  
10 MR. ARMSTRONG: It's not your obligation.  
11 Wait for the next question.  
12 Q. BY MR. CROCKETT: You would recognize  
13 that that would purport to represent that over a  
14 13 month period of time that the rent was 324,836?  
15 A. It says 13 months and, obviously, rent  
16 was given to The Children's Center -- or excuse  
17 me -- to High Mark to make the mortgage payments  
18 with. We've discussed the -- we've discussed the  
19 restructuring and the note payments and so on, but  
20 the money still had to come in to High Mark to make  
21 those payments with.  
22 Q. Okay. Thank you.  
23 (Exhibit \*-011 marked.)  
24 Q. BY MR. CROCKETT: Showing you what's  
25 been marked Exhibit No. \*-011. Do you recognize

PAGE 58

1 A. It says that it was faxed from my  
2 office.  
3 Q. Okay. You don't know who prepared it?  
4 A. I don't remember the document but what  
5 is it? Let's see. I'm not familiar with this, but  
6 I can't say anything more. It looks like it was  
7 faxed from Arave Construction -- from the Arave  
8 Construction office, yes.  
9 Q. You just don't know who prepared it?  
10 A. I do not.  
11 Q. I'll represent to you that it went to  
12 your real estate agent, Paul Fife, and he provided  
13 this. Do you know to the contrary?  
14 A. No, I don't know. That could be true.  
15 It probably is true.  
16 Q. And do you recognize the first line  
17 says, rent received, 6-26 through 7-27-07 -- I'm  
18 sorry -- 6-2006 through 7-2007 of \$324,836?  
19 A. That's what it says.  
20 Q. If that relates to the rent from The  
21 Children's Center to High Mark Development, do you  
22 agree with me it would have to also -- that number  
23 would also have to include the rent represented by  
24 the deferral note?  
25 MR. ARMSTRONG: Objection. Foundation.

PAGE 60

1 the document?  
2 A. Again, I do not. It's something that  
3 looks to me that Scott prepared.  
4 Q. I know it looks like it was faxed,  
5 again, from Arave Construction; do you agree?  
6 A. It is.  
7 Q. Signed by Scott Williams?  
8 A. It looks like it is.  
9 Q. Do you recognize his signature?  
10 A. That looks like his signature, yes.  
11 Q. And do you agree with me that it  
12 appears to be a demand -- simply a Dunner letter or  
13 a collection letter sent to The Children's Center?  
14 MR. ARMSTRONG: Objection. Calls for a  
15 legal conclusion. Foundation. Calls for  
16 speculation.  
17 THE WITNESS: I don't know. Obviously, you  
18 can read the words. October the 8th, so I don't  
19 know what day or what this represents, but Scott  
20 was in charge of collecting the rent and making the  
21 payments, so the letter speaks for itself.  
22 MR. CROCKETT: Okay. Thank you.  
23 (Exhibit \*-012 marked.)  
24 Q. BY MR. CROCKETT: Showing you what's  
25 been marked as Deposition Exhibit No. \*-012. Would

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## LEASE AGREEMENT

THIS LEASE AGREEMENT ("Lease") is entered into as of the nineteenth day of June, 2006 between High Mark Development, LLC ("Lessor") whose address is 1395 N W Main Street, Blackfoot, Idaho 83221, and The Children's Center Inc. (Lessee), whose address is 1619 Curlew Drive, Ammon, Idaho 83406.

### RECITALS

The parties recite and declare:

- A: Lessor has a new building located at Lot 1, Block1, Oakridge Subdivision (Corner of 17<sup>th</sup> and Curlew), Ammon, Idaho 83406 that is acceptable to Lessee in its "as is" condition.
- B: Lessee agrees to lease from Lessor the usable area of 19,990 sq. ft. and has the option to purchase the building after year three from the actual date of commencement of the lease with the value to be determined upon receipt of MAI Appraisal.
- C: Lessee agrees to pay \$ 2,800.00 monthly for taxes lawn care, snow removal. (This figure is subject to change based on the taxes being assessed.

IN CONDITION of the mutual agreements set forth in this Lease, Lessor, and Lessee agree as follows:

1. **DEFINITIONS.** Each of the following terms shall have the indicated Meaning:  
"Monthly Rent" means \$24,987.50 per calendar month for one hundred and twenty (120) months, commencing June 19, 2006 and ending June 19, 2016.  
(Unless specified otherwise in the Recitals above.)

"Annual Base Rent" means Lessee agrees to pay Lessor, without prior notice of demand, as annual base rent for premise, the sum of \$299,850.00 for the first year of the lease, payable in equal payments of \$24,987.50. (Unless otherwise specified in the recitals above.)

"Commencement Date" means June 19, 2006.

"Expiration Date" means June 19, 2016.

"Occupants" means Lessee and any assignee, subtenant, employee, agent, license or invite of Lessee.

"Permitted Use" means operation of a Medical/Mental Health facility and all related

products and items and any other general business not illegal that is allowed under the laws of the Federal Government, the State of Idaho, County of Bonneville or the City of Ammon.

“Premises” means the land and all improvements located thereon.

“Term” means the period commencing on the Commencement Date and expiring on the Expiration Date.

2. **AGREEMENT OF LEASE.** Lessor leases the premises to Lessee and Lessee leases the Premises from Lessor for the Term. Together with such rights of Pedestrian and 1 vehicular ingress and egress and vehicular parking on, over and across the premises as are reasonably necessary for the use of the premises, in accordance with the provisions set forth in, this Lease.

3. **MONTHLY RENT.** Lessee covenants to pay the Lessor the Monthly Rent at the address for Lessor set forth at the outset of this Lease or at such other place as Lessor may designate, in advance on or before the first day of each month during the Term, commencing on the Commencement date.

4. **USE.**

4.1 Lessee shall not use or occupy or permit the Premises to be used or occupied for any purpose other than for the Permitted Use, and shall not do or permit anything to be done by Lessee which may (a) increase the existing rate or violate the provisions of any insurance carried with respect to the premises, (b) create public or private nuisance, (c) violate any applicable governmental laws, ordinances, rules or regulations or any covenants, conditions or restrictions existing with respect to the premises. Lessee shall, at Lessee's sole cost, (d) use the Premises in a careful safe and proper manner, (e) keep the premises free substances, hazardous wastes, pollutants or contaminants on the Premises, except for normal and customary office or cleaning

supplies kept in normal and customary quantities in accordance with applicable laws, ordinances, rules and regulations.

4.2 Covenant of Operation. Lessee shall open the business on or about the Commencement Date. On and after the Commencement date. Lessee shall operate Lessee's business in a manner customary to that industry and agreeable to Lessee.

5. **UTILITIES AND SERVICES.** Commencing on the date of this Lease, Lessee shall pay all initial utility deposits and fees and monthly service charges for any electricity, gas, telephone, other utility and service furnished to the Premises, Lessor shall not be liable for any loss or damage resulting from an interruption of any such service for any reason, excepting only Lessor's willful misconduct or negligence.

**6. MAINTENANCE AND REPAIRS; ALTERATIONS ACCESS**

6.1 Maintenance and Repairs. Lessee, at Lessee's sole cost, shall maintain every part of the Premises in good order, condition and repair and in a clean and sanitary condition.

6.2 Alterations. Lessee shall not make any change, additions or improvements to the Premises (including, without limitation, and the attachment of any fixture or equipment other than pictures and similar decoration), unless such changes, addition or improvements (a) equals or exceeds the then-current standard for the Premises set by Lessor and utilizes only new and first grade materials, (b) is in conformity with all applicable governmental laws, rules and regulations, and is made after obtaining any required permits and licenses, (c) if required by Lessor, is made after Lessee has provided to Lessor such indemnification or bonds, including, without limitation, a performance and completion bond, in such form and amount as may be reasonably satisfactory to Lessor, to protect against claims and liens for the labor performed and materials furnished, and insure the completion of any change, addition or improvement, and the same shall immediately

become property of Lessor. Lessee shall not permit any of Lessee's lenders to record any instrument which purports to encumber any portion of the premises, and shall on written demand immediately cause such to be released of record.

6.4 All real or personal property taxes associated with the leased premises shall be paid by Lessee.

6.5 The parties agree that this is a "Triple Net" lease with all costs associated with the use of this building borne by Lessee.

7. **ASSIGNMENT.** Lessee shall not assign, transfer, mortgage, encumber, pledge or hypothecate this Lease or Lessee's interest in this Lease, in whole or part, permit the use of the Premises or any part of the Premises by any persons other than Lessee or Lessee's employees, or sublease the Premises or any part of the Premises, without the prior written consent of Lessor. Lessor shall not unreasonably withhold or delay Lessor's consent to an assignment of his Lease or a subletting of the whole of the Premises for substantially the remainder of the term, provided that:

(a) Lessee provides to Lessor (i) any information reasonably required by Lessor with respect to the nature and character of the proposal assignee or sublease and its business, activities and intended use of the premises, (ii) any references and current financial information reasonably required by Lessor with respect to the net worth, credit and financial responsibility of the premises, (ii) any references and current financial information reasonably required by Lessor with respect to net worth, credit and financial responsibility of the proposed assignee or subtenant, and (ii) an countertop of the assignment or sublease agreement in form reasonably acceptable to Lessor;

(b) The proposed assignee or subtenant is a reputable party whose net worth, credit and financial responsibility are, considering the responsibilities involved, reasonably satisfactory to Lessor.

No consent by Lessor to any assignment or subleasing by Lessee shall relieve Lessee of any obligation to be paid or performed by Lessee under this Lease, whether occurring before or after such consent, assignment or subleasing, but rather Lessee and Lessee's assignee or subtenant, as the case may be, shall be jointly and severally primarily liable for such payment and performance.

If this Lease is assigned or the Premises are subleased and the compensation actually received by Lessee exceeds Lessee's Monthly Rent, Lessee shall pay fifty percent (50%) of such excess to Lessor to when as received during the Term, or (c) the Premises are damaged to the extent of twenty five percent (25%) or more of then-replacement value or the extent that it would take excess of thirty (30) days to complete the requisite repairs, Lessor may elect to either repair the damage or cancel this Lease by written notice of cancellation within thirty (30) days after such event, and on such event, and on such notice Lessee shall vacate and surrender the Premises to Lessor. Lessor shall not be required to repair and damage or to make any restoration or replacement of any furnishings, trade fixtures, equipment, merchandise and other personal property installed in the Premises by Lessee.

11. **CONDEMNATION.** If the whole of the Premises is taken throughout the exercise of the power of eminent domain or by purchase or other means of lieu of such exercise, the Lease shall automatically terminate as of the date of the taking. If the part, but not all, of the Premises is this so taken, either Lessor or Lessee may terminate this Lease by written notice within thirty (30) days after the date of such taking. If the part of the Premises is taken and the

Lease is not terminated, the Monthly Rent shall be reduced in the proportion area taken bears to the total area of the premises immediately prior to the taking, the Lessee's percentage shall be appropriately adjusted. Whether or not his lease is terminated as a consequence of Condemnation

Proceedings all damages or compensation awarded for a partial or total taking, including any award for severance damage and any sums compensating for diminution in the value of or deprivation or the leasehold estate under this Lease, shall be the sole and exclusive property of Lessor, provided that Lessee's shall be entitled to any award for the loss, or damage to, Lessee's trade fixtures, loss of business or moving expenses, if a separate award is actually made to Lessee and if the same will not reduce Lessor's award. If the Lease is not terminated pursuant to this Paragraph 11, Lessor shall promptly commence diligently pursue to completion the restoration of the Premises to substantially the condition the Premises were in immediately prior to such condemnation to the extent of the award attributable to improvements (but not to land) actually received by Lessor with respect to Premises. Lessor shall not be required any damage or to make any restoration or replacement or any furnishings, trade fixtures, equipment merchandise and other personal property installed in the Premises by Lessee.

## **12. LESSOR'S FINANCING OR ASSIGNMENT.**

12.1 Lessee shall, within fifteen (15) days after Lessor's written request, execute such documents as may reasonably be required by Lessor to subordinate this Lease to any first deed of trust, provided that the lender relying on such subordination agrees with Lessee that Lessee shall not be disturbed in the event of foreclosure so long as Lessee is not in default under Lease and no event has occurred which with the passage of time or giving of notice or both would constitute



such default. This Lease shall be deemed prior to any mortgage or deed of trust if the lender concerned gives notice of such election of Lessee.

12.2 Any sale, assignment or transfer to Lessor's interest under this Lease or in the Premises, including any such disposition resulting from Lessor's default under a debt obligation, shall be subject to this Lease, and Lessee shall be subject to Lessor's successors and assigns and shall recognize such successors and assigns and shall recognize such successors and assigns as the Lessor under this Lease regardless of any rule of law to the contrary or the absence or priority of contract.

### 13. **DEFAULT**

13.1 Default by Lessee. The occurrence of any of the following events shall constitute a default by Lessee under this Lease: (a) Lessee fails to timely pay any installment of the Monthly Rent or Lessee's share of any other sum due under this Lease, and such failure is not cured within five (5) days after written notice is given to Lessee; (b) Lessee fails to timely perform any other obligation to be performed by Lessee under the Lease; and such failure is not cured within ten (10) days after written notice is given to Lessee; provided, however, that if more than ten (10) days is reasonably required to cure such failure, Lessee shall not be in default if Lessee commences such cure within such ten (10) day period and diligently pursues such cure to completion; (c) Lessee or any guarantor files a petition in bankruptcy, becomes insolvent, has taken against such party in any court, pursuant to state or federal statute, a petition in bankruptcy or insolvency or for reorganization or appointment of a receiver or trustee, which involuntary petition is not dismissed within sixty (60) days, petitions for or enters into an arrangement for the benefit of creditors or suffers this Lease to become subject to a writ of execution; or (d) Lessee vacates or

interest at 18% per annum from the due date amount to the date of payment in full, or Lessor may charge a sum of five percent (5%) of such unpaid amount as a service fee at the election of Lessor. All amounts due under this Lease are and shall be deemed to be rent or additional rent, and shall be paid out abatement, deduction offset or prior notice or demand, unless specifically provided by the terms of this Lease. Lessor shall have the same remedies for the default in the payment of any amount due under this Lease as Lessor has for a default in the payment of any amount due under this Lease as Lessor has for a default in the payment of the Monthly Rent as set forth in Paragraph 13.1 above.

13.4 Default by Lessor. Lessor shall not be in default under this Lease unless Lessor, the holder of any mortgage or deed of trust covering the premise whose same name and address have been furnished to Lessee within thirty (30) days after written notice by Lessee to Lessor and to such holder, specifically the respects in which Lessor has failed to perform such obligation. If the nature of Lessor's obligation is such that more than thirty (30) days are reasonably required for the performance or cure. Lessor shall not be in default if Lessor or such holder commences performance within such thirty (30) days period and after such commencement diligently prosecutes the same to completion. In no event may Lessee terminate this Lease or withhold the payment of rent or other charges provided for this Lease as a result of Lessor's default.

14. **EXPIRATION OR TERMINATION.** On the expiration of the Term or sooner termination of this Lease, Lessee shall, at Lessee's sole cost, (a) promptly and peaceably surrender the Premises to Lessor "broom clean" and, subject to Paragraph 10, in the same condition as when delivered to Lessee, ordinary wear and tear excepted, (b) repair any damage caused by or in connection with removal of any property from the Premises, and (c) deliver all

keys to the Premises to Lessor. Before surrendering the Premises, Lessee shall, at Lessee's sole cost, remove Lessee's removable personal property only and all other property shall, unless otherwise directed by Lessor, remain in the Premises as the property, trade fixtures, other property and laterations, additions and improvements made to the Premises by Lessee, and to restore the Premises to their condition on the commencement date.

## **15. SINAGE**

15.1 Lessee shall advertise Lessee's business by sharing a community sign located on Premises. Any repairs and maintenance to the community sign in general shall be shared equally with all other community sign users. The risk of loss to each individual sign located on the community sign shall be borne by each individual user.

15.2 In addition subject tot he prior written approval of Lessor not to be unreasonable withheld Lessee may, at Lessee's sole cost purchase and erect one sign on the Premises designated by Lessor. Lessee shall not place or suffer to be placed on an exterior door, wall, window, or exterior location of the Premises, on any part of the inside of the Premises which is visible from the outside of the Premises any sign decoration, lettering, attachment or other advertising matter, without first obtaining Lessor's written approval, which may be withheld in Lessor's sole direction.

## **16. GENERAL PROVISIONS.**

16.1 Force Majeure.. If either Lessor or Lessee is delayed in or prevented from the performance of any act required under this Lease by reason of acts of God, strikes, lockouts, other labor troubles, inability to procure labor or materials, restrictive laws, ordinances, rules or regulations of general applicability, riots, civil commotion, insurrection war or other reasons not the fault of the party delayed or prevented and beyond the control of such party. (Financial

inability accepted), performance of the action in question shall be excused for the period of the delay and the period from the performance of such act shall be extended for a period equivalent to the period of such delay. The provision of this paragraph shall not, however, operate to excuse Lessee from the prompt payment of rent or other amounts required to be paid under this Lease.

16.2 Notices. Any notice or demand to be given in writing by personal service, Federal Express, or any other similar form of courier or delivery service, or mailing, in the United States mail, postage prepaid, certified, return receipt requested and addressed to such party as set forth at the outset of this Lease. Either Lessor or Lessee may change the address may change the address at which such party desires to receive notice n written notice of such change to the other party. Any such notice shall be deemed to have been given, and shall be effective, on delivery to the notice address then applicable for the party to which the notice is directed; provided, however, that refusal to accept delivery of a notice or the inability to deliver a notice because of an address change which was not properly communicated shall not defeat the giving of a notice.

16.3 Sever Ability. If any provision of this Lease or the application of any provision of this Lease to any person or circumstance shall be to any extent be invalid, the remainder of this Lease or application of such provision to persons or circumstances other than those as to which such provision to persons or circumstances other than those as to which such provision is held invalid shall not be affected by such invalidity. Each provision of this Lease shall be valid and enforceable to the fullest extent permitted by law.

16.4 Successors. This Lease shall be binding on and shall inure to the benefit of Lessor and Lessee and their respective heirs, personal representatives, successors and assigns. On any

sale or assignment (except for purpose of security of collateral) by Lessor of the Premises or this Lease, Lessor shall, on and after such sale or assignment, pass tot he Landlord's successor in interest

16.5 Recourse by Lessee. Anything in this Lease to the contrary notwithstanding, Lessee shall look solely to the equity of Lessor in the Premises, subject tot the prior rights of the holder of any equity of Lessor in the Premises, subject to the prior rights of the holder of any mortgage or deed of trust, for collection of any judgment (or other judicial process), requiring the payment of money by Lessor on any default or breach by Lessor with respect to any of the terms, covenant and conditions of this Lease to be observed or performed by Lessor, and no other asset of Lessor or any other person shall be subject to levy, execution or other procedure for the satisfaction of Lessee's remedies.

16.6 Rights and Remedies. No failure by any party to insist on the strict performance of any provision of this Lease or to exercise any right to remedy consequent on a breach of this Lease shall constitute a waiver of any such breach or of such provision. The rights and remedies of Lessor and Lessee shall not be mutually exclusive of any other provision. The parties confirm that damages at law may be inadequate remedy for a breach or threatened breach by any party of any provisions of this Lease. The parties' respective rights and obligations under this Lease shall be enforceable by specific performance, injunction and any other equitable remedy.

16. Authorization. Each individual executing this Lease does represent and warrant to each other so signing (and each other entity for which another person may be signing) that he has been duly authorized to deliver this Lease in the capacity and for the entity set forth where he signs.

16.8 Attorney's Fees. If either Lessor or Lessee brings suit to enforce or interpret this

Lease, the prevailing party's reasonable attorney's fees and costs incurred in any such action or in any appeal from such action, in addition to the other relief to which the prevailing party is entitled.

16.9 Miscellaneous. Exhibits referred to in this Lease and any addendums and riders attached to this Lease or referred to in any attachment shall be deemed to be incorporated in this Lease as though a part of this Lease. Lessee shall not record this Lease or a memorandum or notice of this Lease. This Lease and the exhibits, riders, and addenda, if any, attached or referred to, constitute the entire agreement between the parties. Any guaranty delivered in connection with this Lease is an integral part of this Lease and constitutes consideration given to Lessor or Lessee unless reduced to writing and signed by both parties. This Lease shall be governed by and construed and interpreted in accordance with the laws of the State of Idaho. Venue on any action arising out of this Lease shall be proper only in the District Court of Bonneville County, Idaho. If more than one person is set forth on the signature line as Lessee, their liability under this Lease shall be joint and several. All applicable provisions of this Lease shall survive the expiration of the Term or sooner termination of this Lease. Time is of the essence of each provision of this Lease. LESSOR AND LESSEE AGREE TO A JUDGE TRIAL IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER ANY MATTER ARISING OUT OF THIS LEASE OR THE USE AND OCCUPANCY OF THE PREMISES. THE PARTIES AGREE TO WAIVE A JURY TRIAL AND OCCUPANCY OF THE PREMISES. THE PARTIES AGREE TO WAIVE A JURY TRIAL AND ALLOW A JUDGE TO DETERMINE THE FACTS AND LAW IN ANY SUCH PROCEEDING.

16.10 Real Property Taxes. Lessor shall be responsible for all real property taxes up to

the commencement for this Lease. Thereafter, Lessee shall be responsible to pay all real property taxes. The parties agree to use the prior year's real property tax assessment as a basis for estimating the real property tax payment for the upcoming year. Once the actual amount of real property tax is assessed, Lessor will adjust the payment. All such money paid by Lessee to Lessor for real property taxes shall be included in the monthly payment to the Lessor.

**17. OPTION TO RENEW LEASE.** Lessee shall have the option and/or right to renew this lease for an additional ten (10) year term provided the monthly rent shall be increased or decreased by the percentage or decrease in the Consumer Price Index, as reported on or close to November 1 of each year, during the term of this Lease. The Consumer Price Index rate shall be those reported by the wall Street Journal publication or a similar publication that reports the Consumer Price Index. For example, if the Consumer Price Index increases 2% from June 2000 to June 2001, and 2% each year during the lease term for a total of 10% increase, the rental rate for the option period shall be adjusted to reflect such market increases. Lessor secures the right to review the rate of this lease after the fourth and eighth year of this lease, based on the same terms as listed above.

**LESSOR**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

*Gordon Beane*

*Manager*

*6/26/06*

**LESSEE**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

*Matthew F. Smith*

*C.E.O.*

*6/26/06*

J

737



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas and )  
Anne O'Shea Trust u/d/t DATED )  
NOVEMBER 2, 1998; GRANDVIEW CREDIT, ) Case No.  
LLC, a California limited liability ) CV-08-4025  
company; CALEB FOOTE, an individual, )  
KATE LARKIN DONAHUE, an individual, )  
JOHN KEVIN DONAHUE, an individual, )  
and SAN FRANCISCO RESIDENCE CLUB, )  
INC., a California corporation; )

Plaintiffs, )

vs. )

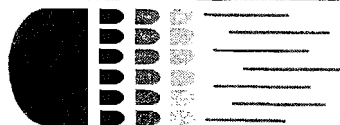
HIGH MARK DEVELOPMENT, LLC, an Idaho )  
limited liability company; GORDON )  
ARAVE, individually and as Officer of )  
High Mark Development, LLC; BENJAMIN )  
D. ARAVE, individually and as Officer )  
of High Mark Development, and JOHN )  
DOES I-X, )

Defendants. )

DEPOSITION OF PAUL FIFE

Thursday, September 25, 2008, 10:30 a.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

**COPY**

REPORTED BY:

PREPARED FOR:

Sandra D. Terrill

RPR, CSR No. 702

Mr. Armstrong

Post Office Box 51020  
IDAHO FALLS, IDAHO 83405

738 208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

1 MR. ARMSTRONG: Which subpoena are you  
2 talking about, mine or yours?  
3 MR. CROCKETT: Mine.  
4 Q. BY MR. CROCKETT: Have you heretofore  
5 provided all those documents?  
6 A. I have.  
7 Q. And those, I think, came to me via your  
8 attorney?  
9 A. Correct.  
10 Q. Did you, likewise, provide those same  
11 documents to Mr. Armstrong, the attorneys for High  
12 Mark Development?  
13 A. I did.  
14 Q. Were the copies of the documents  
15 provided identical in both cases; that is, were they  
16 the same documents provided to Armstrong as they were  
17 to me?  
18 A. There were.  
19 Q. And is your testimony today that you  
20 have gone through your office files and your business  
21 records and provided everything that's responsive to  
22 the subpoena?  
23 A. That's correct.  
24 Q. You know of no other documents that  
25 exist that would be responsive?

1 Mr. Needs as part of this --  
2 A. I did.  
3 Q. -- transaction?  
4 MR. CROCKETT: Can we have this marked as an  
5 exhibit, please.  
6 (Exhibit \*-001 marked.)  
7 Q. BY MR. CROCKETT: Mr. Fife, I'm going to  
8 show you what's been marked as Exhibit No. \*-001,  
9 Deposition Exhibit No. \*-001, and tell me if you can  
10 identify the document.  
11 A. Yes. That's the listing agreement for  
12 the property.  
13 Q. Okay. When we're talking about "the  
14 property," we're still talking about the property at  
15 1675 Curlew Drive?  
16 A. Correct.  
17 Q. Tell me, in general, what you undertake  
18 on behalf of your clients, High Mark and Gordon  
19 Arave, pursuant to this agreement.  
20 MR. ARMSTRONG: Objection. The document  
21 speaks for itself. Calls for a legal conclusion.  
22 Q. BY MR. CROCKETT: Answer the question.  
23 A. Just representation to the seller to try  
24 to procure a buyer for his property.  
25 Q. And in that regard you're the exclusive

1 A. I don't.  
2 Q. What was, in fact, your involvement in  
3 the purchase and sale of the commercial building in  
4 Idaho Falls located at 1675 Curlew?  
5 A. I was the listing agent.  
6 Q. And you indicate you were the agent.  
7 Who were you the agent for?  
8 A. Arave or High Mark Development.  
9 Q. Did you also represent Gordon Arave?  
10 A. Correct.  
11 Q. And did you represent anybody else other  
12 than High Mark and Gordon Arave?  
13 A. Did not.  
14 Q. So you did not act as agents in any way  
15 for the buyers in this transaction, did you?  
16 A. Did not.  
17 Q. Did the buyers, in fact, have their own  
18 real estate agent?  
19 A. They did.  
20 Q. Who was that?  
21 A. Jeff Needs.  
22 Q. And did you personally deal with  
23 Mr. Needs?  
24 A. I did.  
25 Q. And did you share a commission with

1 agent, right?  
2 A. Correct.  
3 Q. What does that mean?  
4 A. Well, I'm the sole broker representing  
5 his property.  
6 Q. And were you acting as a broker in this  
7 context?  
8 A. Well, I'm an associate broker. Doug  
9 Page is our acting broker.  
10 Q. Okay. Can you explain to me the  
11 difference? Is there a difference?  
12 A. Well, he -- Doug would be responsible  
13 for all documentation. It's up to him to create the  
14 files or make sure the files are in order.  
15 Q. I see.  
16 A. I am the -- you know, I was essentially  
17 the selling agent.  
18 Q. Okay. I'm just trying to understand the  
19 respective roles there. Are the roles different,  
20 that is, of a broker and as a selling agent?  
21 A. Well, yeah, because the broker has no  
22 input as far as the selling or the transaction, the  
23 actual input of the information and procuring the  
24 purchase.  
25 Q. As part of your, I guess, contractual

1 more or less simultaneously with this?

2 A. Yes. It may take, you know, one to two  
3 weeks before it gets into the system.

4 Q. Okay. Tell me what LoopNet is, if you  
5 wouldn't mind.

6 A. It's just a portal on the Internet that  
7 specialized advertising commercial properties  
8 nationwide.

9 Q. But it's closed circuit to licensed  
10 Realtors, isn't it, or subscribing Realtors?

11 A. Not necessarily, no. I mean, they have  
12 some short forms, that is somebody can go onto that  
13 site and see some of the properties, but they can  
14 only get brief information.

15 Q. I see.

16 A. They have to be -- pay a fee to get the  
17 complete listing.

18 Q. You have to be a subscriber to get, for  
19 instance, to this specific information --

20 A. Right.

21 Q. -- correct?

22 A. Exactly. Uh-huh.

23 Q. And the subscribers -- is it fair to say  
24 that subscribers are people like you in the  
25 commercial real estate business?

1 Q. All right. Let's review the document  
2 for a minute here.

3 A. Which document?

4 Q. I'm sorry. Exhibit No. \*-002, LoopNet.

5 A. Okay.

6 Q. You say here -- I'm just quoting from  
7 the document. Here is a great investment property  
8 with that hard to find 10-year, triple net lease,  
9 correct?

10 A. Correct.

11 Q. Do you think that really enhances the  
12 marketability of this property, that statement?

13 MR. ARMSTRONG: Objection. Calls for  
14 speculation. Foundation.

15 THE WITNESS: Yes.

16 Q. BY MR. CROCKETT: In your professional  
17 opinion?

18 A. Yes.

19 Q. Why?

20 A. 10-year leases are, just like it says,  
21 hard to find. Usually we work with shorter term than  
22 that.

23 Q. And when you say "great investment  
24 property," are those your words?

25 MR. ARMSTRONG: Objection, asked and

1 A. Right. Investors. A lot of investors  
2 subscribe to it.

3 Q. I see. And what it is -- is it fair to  
4 say that this is an advertising and promotion that  
5 you were carrying on behalf of your client, Arave?

6 A. Correct.

7 Q. Who provided the information contained  
8 in the posting on LoopNet?

9 A. I would have received most of that  
10 probably through Scott.

11 Q. Scott who?

12 A. I have to say I don't know Scott's last  
13 name, but he is the bookkeeper for Mr. Arave.

14 Q. And he's the gentleman that's  
15 accompanied us here --

16 A. Uh-huh.

17 Q. -- accompanied Mr. Arave here? Is it  
18 Scott Williams?

19 A. Yes.

20 Q. Is that the man? Is that correct?

21 A. Yes.

22 Q. You understand he works for Arave?

23 A. Correct -- or, you know, I don't know  
24 whether it could be under High Mark. I can't tell  
25 you that.

1 answered.

2 THE WITNESS: Yes.

3 Q. BY MR. CROCKETT: Triple net lease, what  
4 does that mean?

5 A. It means the tenant pays all the  
6 expenses related to the building, taxes, insurance,  
7 common area maintenance, in addition to the base  
8 rent.

9 Q. Taxes and insurance, maintenance.  
10 Anything else?

11 A. Common area fees, which basically they  
12 take care of the yard, snow removal. The lease  
13 defines that in greater detail.

14 Q. Had you looked at the lease?

15 A. Yes.

16 Q. Did you attempt to confirm any of that  
17 information with the tenant at that time, at the time  
18 this was posted?

19 A. I did not.

20 Q. Up in the upper right-hand corner it  
21 says -- there's a line there that says "cap rate,  
22 8 percent." What does that mean?

23 A. That's the return on the investment.

24 You take the annual base income, divide it by the  
25 purchase value, to create that percentage.

1 A. Our primary issue with the lease was  
2 that the original lease called for the tenant to have  
3 the right to purchase the building within the first  
4 three years of the lease.  
5 Q. I see.  
6 A. It had turned into a roadblock on a  
7 prior purchase and sale agreement that we had started  
8 on.  
9 Q. On the same property?  
10 A. Yes.  
11 Q. So that was an impediment to doing a  
12 previous deal then?  
13 A. Uh-huh.  
14 Q. Yes?  
15 A. Yes.  
16 Q. Did you ever have any discussions with  
17 Mr. Arave concerning the financial stability of the  
18 tenant, The Children's Center?  
19 A. Not directly, no.  
20 Q. Any indirect communications about that?  
21 A. Gordon indicated that he had always paid  
22 on time and he hadn't had any real problems with him.  
23 Q. And he expressly told you that?  
24 A. Uh-huh.  
25 Q. Is that a yes?

1 A. Yes.  
2 Q. Do you remember when he would have said  
3 that?  
4 A. Exact date, no. During our listing  
5 agreement.  
6 Q. Okay. Did you ever have any  
7 communications with Benjamin Arave?  
8 A. I did, yes.  
9 Q. Concerning this transaction?  
10 A. Yes.  
11 Q. And who is Benjamin Arave?  
12 A. I understand Ben is a partner in the --  
13 I want to say --  
14 Q. High Mark Development?  
15 A. High Mark, yes. Basically Ben provided  
16 me information on the loan, on the existing mortgage  
17 that I was able to relay to Jeff Needs.  
18 Q. So some of the information you provided  
19 on to the buyers was provided by Benjamin Arave then?  
20 A. Yes.  
21 Q. And specifically what kind of  
22 information?  
23 A. Related to the existing mortgage.  
24 Q. Okay. How about related to the existing  
25 lease and tenant?

1 A. I don't think I received anything from  
2 Ben on that.  
3 Q. Okay. And did you actually receive  
4 information from Ben?  
5 A. Just he created a link to get ahold of  
6 the men in charge of the existing mortgage, and then  
7 we were able to create a connection with O'Sheas and  
8 the lender.  
9 Q. What other involvement do you  
10 remember -- what other involvement do you remember by  
11 Benjamin Arave?  
12 A. That's primarily it.  
13 Q. And how did these communications with  
14 him occur? Were they in person or over the phone?  
15 A. Over the phone.  
16 Q. And do you know where he was?  
17 A. Not for sure, no. I believe he was down  
18 south, Phoenix, Las Vegas, or someplace like that.  
19 I'm not for sure of that when I did talk to him.  
20 Q. Is he related to Gordon Arave, to your  
21 knowledge?  
22 A. I understand he is.  
23 Q. And do you know the relationship?  
24 A. Not for sure. I want to say brother,  
25 but I'm not dead positive about that.

1 Q. Do you know Jared Arave?  
2 A. No.  
3 Q. Did you ever have any communication in  
4 this context with Jared Arave?  
5 A. Not that I'm aware of.  
6 Q. Let me go back to the LoopNet listing  
7 here and let me just ask you here. You've got up in  
8 the right-hand corner -- I'm sorry -- the left-hand  
9 corner of the second page the scheduled gross income  
10 and the net operating income at \$299,850. When you  
11 posted that information, did you presume that that  
12 was actual money that had been paid by the tenant to  
13 the landlord?  
14 A. I did.  
15 Q. Do you have any reason to believe that  
16 that was not the case?  
17 A. I do not.  
18 Q. We have some information that we've  
19 developed in this case that some of that money would  
20 have been represented by deferred payments or  
21 promissory notes. Was that ever disclosed to you?  
22 A. No.  
23 Q. Do you think that would have made a  
24 difference to the buyer in the case --  
25 MR. ARMSTRONG: Objection, calls for

1 A. Yes.  
 2 Q. Did you have a listing agreement on that  
 3 building?  
 4 A. No.  
 5 Q. What involvement did you have with that  
 6 specific building?  
 7 A. None.  
 8 Q. Do you recall being involved in this  
 9 transaction with providing the buyers with an  
 10 estoppel certificate from the tenant, The Children's  
 11 Center?  
 12 A. I do.  
 13 Q. Tell me what you recall about your  
 14 involvement in that aspect of the transaction.  
 15 A. Strictly just passing the information on  
 16 once I received it.  
 17 Q. And specifically what kind of  
 18 information?  
 19 A. Well, the estoppel agreement in its  
 20 whole.  
 21 Q. So the estoppel certificates, whatever  
 22 were provided to the buyers, were provided through  
 23 you?  
 24 A. Yes.  
 25 Q. Okay. And were there several different

1 versions of an estoppel certificate?  
 2 A. It went through some changes, yes.  
 3 Q. Let me have you identify for me -- this  
 4 is \*-008.  
 5 (Exhibit \*-008 marked.)  
 6 Q. BY MR. CROCKETT: Let me show you what's  
 7 been marked as Deposition Exhibit \*-008, and ask you  
 8 if you can identify that.  
 9 A. Yes. I can identify it.  
 10 Q. Okay. What is it?  
 11 A. Well, it's the estoppel agreement of  
 12 October 17. I think this was one of the first  
 13 drafts.  
 14 Q. Okay. Did you provide that to -- this  
 15 specifically to the buyers?  
 16 A. I believe I did. I can't remember for  
 17 sure. I'm sure I would have had to.  
 18 Q. Well, there's nothing in your file  
 19 that -- or your documents that you provided to us  
 20 that would indicate that this was, in fact, provided  
 21 on to Needs or to the buyers specifically, is there?  
 22 MR. ARMSTRONG: When you talk about "it,"  
 23 there's a letter that accompanies that estoppel  
 24 certificate. You mean by "it," the letter with the  
 25 estoppel certificate?

1 MR. CROCKETT: Yes.  
 2 Q. BY MR. CROCKETT: The question is do you  
 3 recall providing either the letter or the attached  
 4 estoppel certificate to either Needs or the buyers at  
 5 any time?  
 6 A. Well, it appears that I would have had  
 7 to because that's where we got our final signature.  
 8 Q. Were you aware that there was another  
 9 estoppel certificate that was, in fact, provided that  
 10 was actually dated October 17, 2007?  
 11 A. Correct.  
 12 Q. Do you have a copy of that one?  
 13 A. I do. Yes.  
 14 Q. Well, were all these various versions  
 15 provided, or do you remember?  
 16 A. Yes, they were provided.  
 17 Q. By you?  
 18 A. Yes.  
 19 Q. What's the purpose of the estoppel  
 20 certificate, Paul?  
 21 MR. ARMSTRONG: Objection. Calls for a  
 22 legal conclusion. Foundation. Speculation.  
 23 Q. BY MR. CROCKETT: In your opinion.  
 24 A. It basically changed the term of the  
 25 lease when we deleted the phrase about having the

1 right to repurchase after three years.  
 2 Q. Okay. And does the agreement also  
 3 certify to the buyer that the lease is current and in  
 4 effect?  
 5 A. It does.  
 6 MR. ARMSTRONG: Objection, calls for  
 7 speculation.  
 8 Q. BY MR. CROCKETT: And does the estoppel  
 9 certificate -- is its intention to verify to the  
 10 tenant that the lease payments are current?  
 11 MR. ARMSTRONG: Same objection, foundation.  
 12 THE WITNESS: Yes.  
 13 Q. BY MR. CROCKETT: Okay. And was that  
 14 specifically the reason why it was provided on to the  
 15 buyers and their agent?  
 16 MR. ARMSTRONG: Objection, calls for  
 17 speculation.  
 18 THE WITNESS: Yes. It was the request of  
 19 the buyer.  
 20 Q. BY MR. CROCKETT: So it was part of the  
 21 deal, wasn't it?  
 22 A. Yes.  
 23 Q. Do you have any record of how you would  
 24 have received or how you would have transmitted  
 25 actually the lease estoppel certificate that's dated

1 October 17th?  
 2 A. I don't have anything to substantiate  
 3 it, but I'm relatively certain that I faxed it to  
 4 Jeff Needs.  
 5 Q. I see. Okay. There isn't anything in  
 6 your file that would indicate one way or another how  
 7 you got it on to him, is there?  
 8 A. There is not.  
 9 Q. Did you have any role at all in  
 10 negotiating the terms of the estoppel certificate?  
 11 A. No.  
 12 Q. Did you ever have any -- who did you  
 13 understand was doing that?  
 14 A. My understanding was it was Rick and The  
 15 Children's Center's attorney, Marc Weinpel.  
 16 Q. When you say Rick, you mean Rick  
 17 Armstrong?  
 18 A. Rick Armstrong.  
 19 Q. Do you know of anybody else that was  
 20 involved in any of the negotiations of securing a  
 21 lease estoppel certificate?  
 22 A. I do not.  
 23 Q. Were you aware of apparently the  
 24 concessions that were granted by Arave to The  
 25 Children's Center in exchange for the lease estoppel

1 certificate?  
 2 A. I was.  
 3 Q. And what did you understand those  
 4 considerations to be?  
 5 A. It was a note that The Children's Center  
 6 owed Gordon in exchange for the note. That's what  
 7 they used to remove the phrase from the document,  
 8 from the lease.  
 9 Q. Which phrase?  
 10 A. The right to repurchase.  
 11 Q. I see. Any other considerations you  
 12 recall?  
 13 A. Not that I'm aware of.  
 14 Q. How did you know that there was this  
 15 consideration in exchange for the lease estoppel  
 16 certificate?  
 17 A. Well, Gordon told me that that's what  
 18 they'd come up with to try to make it happen.  
 19 Q. Was that communicated to Needs or any  
 20 other agent of the buyers?  
 21 A. It was.  
 22 Q. And how did you communicate that?  
 23 A. Verbally.  
 24 Q. And when do you recall that  
 25 communication would have occurred?

1 A. Well, it had to be in the same time  
 2 frame as when the certificate was put together or  
 3 prior to.  
 4 Q. And how did the communication occur  
 5 though? Was it by telephone?  
 6 A. By telephone.  
 7 Q. And tell me what you recall then the  
 8 substance of your conversation with Needs concerning  
 9 the consideration extended for the lease estoppel  
 10 certificate.  
 11 A. I'm not sure I -- bring that by me  
 12 again, please.  
 13 Q. Well, the question is simply what do you  
 14 recall specifically about your phone discussion with  
 15 Needs?  
 16 A. Well, obviously, in the original --  
 17 start of the transaction their concern again was that  
 18 -- I expressed my concern to Gordon and that's when  
 19 they kind of came up with -- you know, they tried to  
 20 work it out with Matt to remove that, and that's when  
 21 the consideration was put together. Then I passed  
 22 that on to Jeff that we was able to -- you know, by  
 23 letting this promissory note be relieved, we were  
 24 able to get them to remove that phrase.  
 25 Q. Did you know what the promissory note

1 was all about?  
 2 A. Did not.  
 3 Q. Did you have any indication it was for  
 4 nonpayment of rent or for rent deferral, so to speak?  
 5 A. No, sir.  
 6 Q. So that wasn't communicated to Needs?  
 7 A. No.  
 8 Q. Had you ever seen the specific note in  
 9 question?  
 10 A. No.  
 11 Q. Have you ever seen it since?  
 12 A. No.  
 13 Q. The purchase and sale agreement  
 14 essentially provides -- let's see here. The original  
 15 purchase and sale agreement originally provided a  
 16 closing date of no later than September 15th, '07.  
 17 Is that correct?  
 18 A. Correct.  
 19 Q. Did the parties extend the closing date  
 20 by mutual agreement?  
 21 A. They did.  
 22 Q. And the record would indicate that the  
 23 transaction was actually closed on December 7th, '07.  
 24 Would that be right or --  
 25 A. Correct.

SHEET 18 PAGE 69

1 to Gordon and he had to collect those, and that was  
2 pretty much where I was at.

3 Q. But leading up to the closing, just from  
4 a general historical standpoint, did Mr. Arave or did  
5 anyone on the High Mark side of the ledger ever  
6 indicate to you that, you know, working with these  
7 guys can sometimes be a pain in the butt because  
8 they're late sometimes. Yeah, they paid their rent  
9 but sometimes they're late, anything like that?

10 MR. CROCKETT: I'll object to the form of  
11 the question.

12 THE WITNESS: He indicated that trying to  
13 deal with Matt Smith directly had been difficult and  
14 pretty much everything had gone through the  
15 attorneys.

16 Q. BY MR. ARMSTRONG: Did you relay that  
17 information to Jeff Needs?

18 A. No.

19 Q. Did you feel the need to?

20 A. I didn't. I mean, he was aware -- Jeff  
21 was aware that we were -- most all of our  
22 correspondence was being generated through the  
23 attorneys.

24 Q. Did he ever ask, why do we need to be  
25 doing this through attorneys?

PAGE 71

1 A. Yes.

2 Q. You then testified you were asked about  
3 this statement in Exhibit \*-002 under property  
4 description, here is a great investment property with  
5 that hard to find 10-year, triple net lease. And you  
6 were asked whose words those were. You said they  
7 were your words?

8 A. Correct.

9 MR. CROCKETT: Object.

10 Q. BY MR. ARMSTRONG: Who wrote Exhibit  
11 \*-002?

12 A. Who what?

13 Q. Who wrote Exhibit \*-002?

14 A. The information in it?

15 Q. Correct.

16 A. I did.

17 Q. Did you do that on line?

18 A. Yes.

19 Q. There is in Exhibit \*-002 mention in the  
20 top right corner to Needs Real Estate Services,  
21 correct?

22 A. Well, this had been a copy that Jeff  
23 would have pulled off the Internet from LoopNet.  
24 That's why it says that.

25 Q. Did you understand that Needs Real

PAGE 70

1 A. No.

2 Q. That was never a question?

3 A. Uh-uh.

4 Q. Is that a no?

5 A. Yes.

6 Q. Just so that we're clear on the record,  
7 you testified about discussions that you had with Ben  
8 Arave. And is it your testimony that the only  
9 information Ben Arave provided to you in connection  
10 with this transaction was related to the mortgage  
11 holder or the lender on that particular property?

12 A. Correct. Mortgage information.

13 Q. Did he ever share any information with  
14 you about The Children's Center?

15 A. No, not that I can remember.

16 Q. Did Ben Arave ever share information  
17 with you about the financial stability of The  
18 Children's Center?

19 A. No.

20 Q. Now, you testified with regard to  
21 Exhibit \*-002, this LoopNet listing. You were asked  
22 a question by Mr. Crockett as to who the source of  
23 the information was, and I think you testified it was  
24 Scott Williams, at least from what you could  
25 remember?

PAGE 72

1 Estate Services was the entity that Jeff Needs --

2 A. Yes.

3 Q. -- was acting as a buyers' agent in this  
4 transaction?

5 A. Yes.

6 Q. Had you dealt with Jeff Needs before in  
7 the past?

8 A. No.

9 Q. Was this your first experience with Jeff  
10 Needs?

11 A. Yes.

12 Q. Were you aware prior to working with  
13 Jeff Needs in this transaction about his experience  
14 in the commercial real estate industry?

15 A. Was not.

16 Q. Were you aware prior to the closing  
17 about the buyers, the actual buyers experience in  
18 commercial real estate buying and lending?

19 A. Just through -- Jeff said that they --  
20 that he'd worked with them prior, properties.

21 Q. When did he tell you that?

22 A. Probably sometime in the -- you know,  
23 the duration of putting the contract together. I  
24 would guess sometime in September, October.

25 Q. Did he tell you specifics about previous

1 transactions?

2 A. No.

3 Q. Did he tell you where those transactions  
4 were?

5 A. No.

6 Q. Did he just tell you one -- give me your  
7 fullest recollection of what he said in regard to  
8 working with the O'Shea and the trust --

9 A. He stated that the O'Sheas was a good  
10 client of his and that he had done several deals with  
11 them. That was his recollection.

12 Q. Did you know about where Jeff Needs came  
13 from originally --

14 A. No.

15 Q. -- whether he was from California?

16 A. No.

17 MR. CROCKETT: Can we go off the record a  
18 minute?

19 MR. ARMSTRONG: Sure.

20 (A discussion was held off the record.)

21 (Exhibit \*-009 marked.)

22 Q. BY MR. ARMSTRONG: Back on the record.  
23 Mr. Fife, handing you what's been marked as Exhibit  
24 \*-009 to your deposition -- and you've got a stack  
25 here. Is it all right if we fold that up so we don't

1 package of information with Exhibit \*-009?

2 A. Yes.

3 Q. How did you receive it?

4 A. I thought it was -- you know. I couldn't  
5 recall, but apparently it was FedEx'd to me.

6 Q. What did you do when you received it; do  
7 you remember?

8 A. Forwarded it directly to Jeff Needs.

9 Q. And my receipt for that -- I'm going to  
10 represent my receipt for the delivery of that set of  
11 documents indicates that it was signed for by a  
12 T. Brown. Do you know who that is?

13 A. That was the receptionist that used to  
14 work for us.

15 Q. Okay. Did she work for you at the time  
16 that this package was delivered?

17 A. Yes.

18 Q. And going back to the question of what  
19 you did when you received it. You got it, you opened  
20 it; what did you do?

21 A. Just put it back and forwarded it.

22 Q. Okay. And your receipt indicates you  
23 sent that --

24 A. Yeah, I'm seeing that.

25 Q. -- almost a month later. Do you know

1 get into all that other stuff?

2 Exhibit \*-009 is an August 28th, 2007,  
3 letter that I sent to you; is that correct?

4 A. Correct.

5 Q. It says, please find enclosed herewith  
6 the financial records of The Children's Center, Inc.,  
7 requested by the O'Shea Family Trust. Did I read  
8 that correctly?

9 A. Correct.

10 Q. These documents have been provided to me  
11 under a confidentiality agreement, where we've agreed  
12 to only disclose them to the O'Shea Family Trust for  
13 the purposes of purchase and sale of the building at  
14 issue. Did I read that correctly?

15 A. Correct.

16 Q. Do you remember receiving this?

17 A. I do, now that it's in front of me. It  
18 was a cover letter for the financial information that  
19 I forwarded to Jeff Needs.

20 (Exhibit \*-010 marked.)

21 Q. BY MR. ARMSTRONG: Handing you what's  
22 been marked for your deposition as Exhibit \*-010.

23 A. \*-010?

24 Q. Yes. Those are the tax returns and the  
25 company balance sheet. Do you recall receiving this

1 why the delay?

2 A. I can't say. I thought I had sent it  
3 out right after I received the package.

4 Q. This was late summer. Had you gone on  
5 vacation?

6 A. I was out of town for a couple of weeks  
7 during that, but I'm not --

8 Q. Okay. Now, Exhibit \*-010 that you have  
9 in front of you, did you look at these documents in  
10 Exhibit \*-010 --

11 A. Did not.

12 Q. -- when you received them? You didn't  
13 thumb through them and look and see what they were?

14 A. No. Your cover letter indicated  
15 confidentiality so they were for the O'Shea Family  
16 Trust.

17 Q. Okay. And all you did was just -- did  
18 you put them into a FedEx envelope or did you give  
19 them to Ms. Brown?

20 A. Ms. Brown would have done it.

21 Q. And your receipt that was marked as -- I  
22 think it's Exhibit \*-007.

23 A. It's \*-005.

24 Q. Exhibit \*-005. We're missing \*-005,  
25 guys.



1 A. That's the one she scribbled on. Is  
2 that what you're looking for?  
3 Q. Yeah. Exhibit \*-005 you've attached to  
4 it a Federal Express receipt that indicates it was  
5 signed for by an E. Vaughn. Do you know who  
6 E. Vaughn is?  
7 A. I don't.  
8 Q. Don't know if she or he works for Jeff  
9 Needs in his office?  
10 A. I couldn't tell you that.  
11 Q. Did you see the -- referring back to  
12 Exhibit \*-010, did you see the August 28th, 2007,  
13 balance sheet that was included with that  
14 information?  
15 A. I can't say as I remember seeing that.  
16 But, like I said, I didn't look at it.  
17 Q. You didn't see the items that were  
18 listed under notes payable in that balance sheet?  
19 A. I just didn't review the documents.  
20 Q. You just forwarded that on to the buyer  
21 and assumed that the buyer would --  
22 A. Right.  
23 Q. -- review the information and do with it  
24 what he or she would do, right?  
25 A. Correct.

1 Q. You didn't control anything at that  
2 point as to whether the buyer would inspect Exhibit  
3 \*-010 or not, correct?  
4 A. Correct.  
5 Q. You testified about estoppel  
6 certificates. Do you remember that testimony?  
7 A. Yes.  
8 Q. Do you remember how many estoppel  
9 certificates were exchanged between the buyer and the  
10 seller in this case?  
11 A. I don't. I think there was two or  
12 three.  
13 Q. You mentioned one of the reasons for the  
14 variations in the estoppel certificates was because  
15 of this option to purchase. Do you remember that?  
16 A. Yes.  
17 Q. And it was a -- the option to purchase  
18 was a pretty big deal to the buyer, correct?  
19 A. Correct.  
20 Q. In fact --  
21 MR. CROCKETT: Object to the form of the  
22 question as leading. My objection is, Counsel, to  
23 the continuing leading nature of your questions.  
24 Q. BY MR. ARMSTRONG: And the -- if that  
25 option was to stay in place, do you recall

1 conversations with Jeff Needs that the buyer wanted  
2 an indemnification, personal guarantee, if you will,  
3 by Gordon Arave?  
4 MR. CROCKETT: Objection to form.  
5 THE WITNESS: I can't remember that. I  
6 think the indemnification was something that was  
7 maybe proposed to see if they would work with that.  
8 Q. BY MR. ARMSTRONG: You didn't have any  
9 involvement with negotiating that indemnification?  
10 A. No.  
11 Q. Just communicating --  
12 A. Correct.  
13 Q. -- those questions or issues to the  
14 seller, correct?  
15 A. Correct.  
16 (Exhibit \*-011 marked.)  
17 Q. BY MR. CROCKETT: Handing you what's  
18 been marked in your exhibits as Exhibit \*-011.  
19 Handing you what's been marked as Exhibit \*-011 to  
20 your deposition. Do you recognize that as an e-mail  
21 string between you and Jeff Needs?  
22 A. Yes.  
23 Q. Did you communicate a lot with Jeff  
24 Needs by e-mail?  
25 A. Not a lot, but some. Most of it was

1 phone conversation.  
2 Q. Did you ever communicate with him  
3 through text messaging?  
4 A. No.  
5 Q. This Exhibit \*-011, the first e-mail --  
6 well, they're both dated October the 3rd, 2007. It's  
7 just a couple months before closing. Jeff writes to  
8 you and says, Paul, attached is a letter explaining  
9 buyer's position on the property. The estoppel was  
10 not acceptable and, therefore, we still need some way  
11 for tenant to agree to what we feel is already  
12 provided in the lease. Did I read that correctly?  
13 A. Correct.  
14 Q. We do not believe that we are asking for  
15 anything outside the spirit of the lease and the  
16 intentions of Gordon and the tenant. Did I read that  
17 correctly?  
18 A. Correct.  
19 Q. Our hope is that Gordon can find some  
20 way for the tenant to document the intent of NNN --  
21 does he mean Triple Net?  
22 A. Triple Net, uh-huh.  
23 Q. -- and the fact that the MAI appraisal  
24 process should be mutually agreed upon. Did I read  
25 that correctly?

K



## RE- 16 EXCLUSIVE SELLER REPRESENTATION AGREEMENT

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

DATE June 4, 2007AGENT: Paul Fife

Acting as Agent for the Broker

1. SELLER High Mark Development LLCretains Paul FifeBroker of High Desert Realtors

Exclusive SELLER'S Broker to sell, lease, or exchange the property described in Item #2 below, during the term of this agreement and on any additional terms hereafter set forth.

2. PROPERTY ADDRESS AND LEGAL DESCRIPTION. The property address and the complete legal description of the property are as set forth below.

Address 1675 Curlew DriveCounty BonnevilleCity AmmonZip 83221Legal Description No. 50,403.98 Sq. Ft. Lot 1, Block 1, Oak Ridge Division

or ☐ Legal Description Attached as addendum # \_\_\_\_\_ (Addendum must accompany original listing)

3. TERM OF AGREEMENT. The term of this Agreement shall commence on June 4, 2007 and shall expire 11:59 p.m. on June 1, 2008 unless renewed or extended. If the SELLER accepts an offer to purchase or exchange the terms of this Agreement shall be extended through the closing of the transaction.

4. PRICE. SELLER agrees to sell the property for a total price of \$ 3,800,000

5. FINANCING. SELLER agrees to consider the following types of financing. (Complete all applicable provisions)

☐ FHA ☐ VA ☐ CONVENTIONAL ☐ IHFA ☐ RURAL DEVELOPMENT ☐ Exchange  
☐ Cash ☐ Cash to existing loan(s) ☐ Assumption of existing loan(s)

☐ SELLER will carry contract and accept a minimum down payment of \$ \_\_\_\_\_ and an acceptable secured note for the balance to be paid as follows.

Other acceptable terms Cash/New Loan/assumption of existing loan

Brokers are required by Idaho Real Estate Law to present all written offers.

## 6. BROKERAGE FEE.

(A) If Broker or any person, including SELLER, procures a purchaser ready, willing and able to purchase, transfer or exchange the property on the terms stated herein or on any other price and terms agreed to in writing, the SELLER agrees to pay a total brokerage fee of \$ \_\_\_\_\_ % of the contract or purchase price OR \$ \_\_\_\_\_ of which \_\_\_\_\_ % of the contract purchase price OR \$ \_\_\_\_\_ will be shared with the cooperating brokerage unless otherwise agreed to in writing. The fee shall be paid in cash at closing unless otherwise designated by the Broker in writing.

(B) Further, the brokerage fee is payable if the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged or optioned or agreed to be sold, exchanged or optioned within 30 days following expiration of the term hereof to any person who has examined, been introduced to or been shown the property during the term hereof.

(C) If SELLER, upon termination of this Agreement, enters into an Exclusive Right to Sell Agreement to market said property with another Broker, then the time period specified above in Section 6B, shall not apply and will be of no further force or effect.

7. ADDITIONAL FEES: none

SELLER'S Initials ( [Signature] ) 6/4/07 Date

748

Exhibit No. 1  
 Date: 6-25-08  
Fife  
 T&T REPORTING

PROPERTY ADDRESS: 1675 Curlew Drive

Ammon

**8. INCLUDED ITEMS.** SELLER agrees to leave with the premises all attached floor coverings, attached television antennae, satellite dish and receiving equipment, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, built in and "drop in" ranges (*but excluding all other ranges*), fuel tanks and irrigation fixtures and equipment, and any and all, if any, water and water rights, and any and all, if any, ditches and ditch rights appurtenant thereto that are now on or used in connection with the premises shall be included in the sale unless otherwise provided herein. Also include none

**9. EXCLUDED ITEMS.** Tenants personal property

**10. TITLE AND EXISTING ENCUMBRANCES.** Title to the property is to be conveyed by Warranty Deed unless otherwise provided herein, and is to be marketable and insurable except for rights reserved in federal patents, federal, state or railroad deeds, building or use restrictions, building and/or zoning regulations and ordinances of any governmental entity, and rights of way and easements established or of record. The individual executing this Agreement warrants and represents that said individual either owns the property or has full power and right to enter into this Agreement and to sell and convey the property on behalf of the SELLER and that to the best of said individual's knowledge the property is in compliance with all applicable building and zoning regulations and with any applicable covenants and restrictions affecting the property except none

The SELLER agrees to provide good and marketable title to the property at the time of closing. The property is currently encumbered by the following liens:

☒ 1st Mortgage ☐ 2nd Mortgage ☐ Home Equity Loan ☐ Other \_\_\_\_\_  
☐ The property is not encumbered by any mortgage, lien, or other security instrument.  
 Loan payments ☒ are ☐ are not current; loan ☒ is ☐ is not assumable. If loan is assumable, Buyer ☒ will ☐ will not be required to qualify as ☒ will ☐ will not release SELLER'S liability.

SELLER is aware that some loans have a recapture provision or prepayment penalty and SELLER may be required to pay additional funds to satisfy such recapture or penalty.

**11. MULTIPLE LISTING SERVICE AUTHORIZATION.** (Name of MLS) Idaho Falls Board of Realtors

JH (Initial) By initialing this line, it is understood that Broker is a member of the above MLS. SELLER authorizes and directs Broker to offer to cooperate with and compensate other Brokers, and to submit a Property Data Sheet and any authorized changes to MLS as required in the Rules and Regulations of the above MLS. SELLER understands and agrees that any MLS information regarding the above property will be made available to Buyer's Agents and/or Dual Agents. SELLER acknowledges that it has been explained that any sales price information compiled as a result of this Agreement may be provided to the County Assessor's office. SELLER agrees that any such disclosure is permissible.

**12. LOCKBOX AUTHORIZATION.**

  /   (Initial) By initialing this line, SELLER directs that a lockbox containing a key which gives MLS Keyholders access to the property shall be placed on any building located on the property. SELLER authorizes MLS Keyholders to enter said property to inspect or show the same. SELLER agrees to hold Broker harmless from any liability or loss.

**13. ADVERTISING AUTHORIZATION.**

SELLER ☒ does ☐ does not agree to allow Broker to advertise said property in print media.  
 SELLER ☒ does ☐ does not agree to allow Broker to advertise said property in internet advertising media.  
 SELLER ☒ does ☐ does not agree to allow Broker to advertise said property in other advertising media.  
 SELLER ☐ does ☒ does not agree to allow Broker to place the Broker's sign on above property.

**14. SELLER'S PROPERTY DISCLOSURE FORM.** If required by Title 55, Chapter 25 Idaho Code, SELLER shall within ten (10) days after execution of a Purchase and Sale Agreement provide to Buyer "SELLER'S Property Disclosure Form" and Buyer shall have three (3) business days from receipt of the disclosure report to rescind the offer in a written signed and dated document delivered to the SELLER or the SELLER'S Agents. Buyer rescission must be based on a specific written objection to a disclosure made in the SELLER'S Property Disclosure Form:

SELLER'S Initials ( JH ) 6/4/07 Date

PROPERTY ADDRESS: 1675 Curlew Drive

Ammon

**15. LEAD BASED PAINT DISCLOSURE.** SELLER has been advised of disclosure obligations regarding lead-based paint and lead-based paint hazards in the event property is a defined "Target Housing" under Federal Regulations. Said property ☐ is ☒ is not "Target Housing". If yes, SELLER agrees to sign and complete the Information Disclosure and Acknowledgment Form provided to me and deliver to my agent all record test reports or other information related to the presence of lead-based paint or lead-based paint hazards, if any.

**16. TRANSACTION RELATED SERVICES DISCLAIMER:** SELLER understands that Broker is qualified to advise SELLER on general matters concerning real estate, but is not an expert in matters of law, tax, financing, surveying, structural conditions, property inspections, hazardous materials, or engineering. SELLER acknowledges that Broker advises SELLER to seek expert assistance for advice on such matters. The Broker or Broker's agents may, during the course of the transaction, identify individuals or entities who perform services including **BUT NOT LIMITED TO** the following; home inspections, service contracts, appraisals, environmental assessment inspection, code compliance inspection, title insurance, closing and escrow services, loans and refinancing services, construction and repair, legal and accounting services, and/or surveys. The SELLER understands that the identification of service providers is solely for SELLER'S convenience and that the Broker or the agents is not guaranteeing or assuring that the service provider will perform its duties in accordance with the SELLER'S expectations. SELLER has the right to make arrangements with any entity SELLER chooses to provide these services. SELLER hereby releases and holds harmless the Broker and Broker's agents from any claims by the SELLER that service providers breached their agreement, were negligent, misrepresented information, or otherwise failed to perform in accordance with the SELLER'S expectations. In the event the SELLER requests Broker to obtain any products or services from outside sources, **SELLER agrees to pay for them immediately when payment is due.** For example: surveys (engineering, environmental and/or soil tests, title reports, home or property inspections, appraisals, etc.

**17. CONSENT TO LIMITED DUAL REPRESENTATION AND ASSIGNED AGENCY:** The undersigned SELLER(S) have received, read and understand the Agency Disclosure Brochure (prepared by the Idaho Real Estate Commission). The undersigned SELLER(S) understand that the brokerage involved in this transaction may be providing agency representation to both the SELLER(S) and the Buyer. The undersigned SELLER(S) each understands that, as an agent for both SELLER/client and Buyer/client, a brokerage will be a limited dual agent of each client and cannot advocate on behalf of one client over another, and cannot legally disclose to either client certain confidential client information concerning price negotiations, terms or factors motivating the Buyer/client to buy or the SELLER/client to sell without specific written permission from the client to whom the information pertains. The specific duties, obligations and limitations of a limited dual agent are contained in the Agency Disclosure Brochure as required by Section 54-2085, Idaho Code. The undersigned SELLER(S) each understands that a limited dual agent does not have a duty of undivided loyalty to either client.

The undersigned SELLER(S) further acknowledge that, to the extent the brokerage firm offers assigned agency as a type of agency representation, individual sales associates may be assigned to represent each client to act solely on behalf of the client consistent with applicable duties set forth in Section 54-2087, Idaho Code. In an assigned agency situation, the designated broker (the broker who supervises the sales associates) will remain a limited dual agent of the client and shall have the duty to supervise the assigned agents in the fulfillment of their duties to their respective clients, to refrain from advocating on behalf of any one client over another, and to refrain from disclosing or using, without permission, confidential information of any other client with whom the brokerage has an agency relationship. SELLER ☐ does ☐ does not consent to allow Buyer's Agents and/or Limited Dual Agents to show property and to allow the Broker to share brokerage fees as determined by the Broker with Buyer's Agents and/or Limited Dual Agents.

**18. SELLER NOTIFICATION AND CONSENT TO RELEASE FROM CONFLICTING AGENCY DUTIES:** SELLER acknowledges that Broker named above has disclosed the fact that at times Broker acts as agent(s) for other Buyers and for SELLERS in the sale of the property. SELLER has been advised and understands that it may create a conflict of interest for Broker to introduce Buyers to SELLER Client's property because Broker could not satisfy all of its Client duties to both Buyer Client and SELLER Client in connection with such a showing or any transaction which resulted.

Based on the understandings acknowledged, SELLER makes the following election: (Make one selection only)

Initials  
Limited Dual  
Agency and/or  
Assigned Agency

OR

Initials  
Single Agency

SELLER **does want** Broker to introduce any interested Client of Broker to Client SELLER'S property and hereby agrees to relieve Broker of conflicting agency duties, including the duty to disclose confidential information known to the Broker at that time and the duty of loyalty to either party. Relieved of all conflicting agency duties, Broker will act in an unbiased manner to assist the SELLER and Buyer in the introduction of Buyers to such SELLER Client's property and in the preparation of any contract of sale which may result. SELLER authorizes Broker to act in a **limited dual agency** capacity. Further, SELLER agrees that Broker may offer, but is not obligated to offer, **assigned agency** representation, and if offered by the Broker, SELLER authorizes Broker to act in such capacity.

SELLER **does not want** Broker to introduce interested Buyer Clients to Client SELLER'S property and hereby releases Broker from any responsibility or duty under the agency agreement to do so. Broker shall be under no obligation or duty to introduce the Buyer to any Client SELLER'S property.

SELLER'S Initials ( JO. 750 6/4/07 Date

PROPERTY ADDRESS: 1675 Curlew Drive

Ammon

19. INFORMATION WARRANTY. SELLER warrants that all information provided by the SELLER herein and hereafter will be true and corre

20. DEPOSIT. Brokers are authorized to receive a deposit from any prospective purchaser who offers to purchase or exchange the property and shall notify SELLER of the receipt of any such deposit. Acceptance of such deposit by a Broker shall not constitute SELLER'S acceptance of any such offer.

21. GENERAL PROVISIONS. In the event either party shall initiate any suit or action or appeal on any matter relating to this Agreement the defaulting party shall pay the prevailing party all damages and expenses resulting from the default, including all reasonable attorneys' fees and court costs and other expenses incurred by the prevailing party. This Agreement is made in accordance with and shall be interpreted and governed by the laws of the State of Idaho. All rights and obligations of the parties hereunder shall be binding upon and inure to the benefit of their heirs, personal representatives, successors and assigns.

22. NON-DISCRIMINATION. SELLER and Broker acknowledge that it is illegal to discriminate in the showing, sale or leasing of the property on the basis of race, religion, creed, color, sex, marital status, national origin, familial, or handicapped status of such person.

23. SINGULAR AND PLURAL terms each include the other, when appropriate.

24. FACSIMILE TRANSMISSION. Facsimile or electronic transmission of any signed original document and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either party or the Closing Agency, the parties will confirm facsimile and electronic transmitted signatures by signing an original document.

25. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

26. OTHER TERMS AND CONDITIONS: Exclusions: Matt Smith and Associates

CONTRACTOR REGISTRATION # (if applicable)

Seller Signature: High Mark Dev. LLC

Accepted: \_\_\_\_\_  
(Broker)

Seller Signature: Jordan Allen

By: \_\_\_\_\_  
(Agent)

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Address: \_\_\_\_\_

Address: 700 So. Woodruff

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

City: Idaho Falls State: ID Zip: 83401

E-Mail: \_\_\_\_\_

E-Mail: pfife@highdesertrealtors.com

Phone(s): \_\_\_\_\_

Phone(s): \_\_\_\_\_

Fax: \_\_\_\_\_

Fax: \_\_\_\_\_

THE PROVISIONS CONTAINED ON PAGES ONE, TWO AND THREE SHALL ALSO CONSTITUTE PART OF THE AGREEMENT OF THE PARTIES. EACH OF THE PARTIES ACKNOWLEDGES READING THIS AGREEMENT IN FULL.

751

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752

# A. Settlement Statement

U.S. Department of Housing  
and Urban Development

OMB No. 2502-0265

<b>B. Type of Loan</b>				<b>6. File Number</b>		<b>7. Loan Number</b>		<b>8. Mortgage Ins. Cost Number</b>	
1. <input type="checkbox"/> FHA 2. <input type="checkbox"/> FmHA 3. <input type="checkbox"/> Conv Unit 4. <input type="checkbox"/> VA 5. <input type="checkbox"/> Conv Inv 6. <input type="checkbox"/> Seller Finance				06187300B					
<b>C. Note:</b> This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "In.o.c." were paid outside the closing; they are shown here for informational purposes and are not included in the totals.									
<b>D. Name &amp; Address of Borrower</b>				<b>E. Name &amp; Address of Seller</b>				<b>F. Name &amp; Address of Lender</b>	
Thomas and Anne O'Shea Trust Dated December 30, 1998				High Mark Development, LLC				SinoCorp Mortgage Investors, LLC 19125 NW Tannhauser Drive Hillsboro, OR 97124	
<b>G. Property Location</b>				<b>H. Settlement Agent Name</b>				<b>I. Settlement Date</b>	
Oak Ridge #1, Block 1, Lot 1, Bonanza County 1675 Curlew Drive Idaho Falls, ID 83405				Idaho Title & Trust, Inc. 400 Memorial Drive Idaho Falls, ID 83402 Tax ID: 46-0510006				12/17/07	
<b>J. Summary of Borrower's Transaction</b>				<b>K. Summary of Seller's Transaction</b>					
<b>100. Gross Amount Due from Borrower</b>				<b>400. Gross Amount Due to Seller</b>					
101. Contract Sales Price \$3,700,000.00				401. Contract Sales Price					
102. Personal Property				402. Personal Property					
103. Settlement Charges to borrower \$18,530.36				403.					
104.				404.					
105.				405.					
<b>Adjustments for items paid by seller in advance</b>				<b>Adjustments for items paid by seller in advance</b>					
106. County Tax				406. County Tax					
107. HOA Dues				407. HOA Dues					
108. Sewer Dues				408. Sewer Dues					
109. Irrigation				409. Irrigation					
110. Rents				410. Rents					
111. Prorated Taxes \$57,879.61				411. Prorated Taxes					
112.				412.					
113.				413.					
114.				414.					
115.				415.					
116.				416.					
<b>120. Gross Amount Due From Borrower \$3,721,409.93</b>				<b>420. Gross Amount Due to Seller</b>					
<b>200. Amounts Paid By Or In Behalf Of Borrower</b>				<b>500. Reductions in Amount Due to Seller</b>					
201. Deposit or earnest money \$100,000.00				501. Excess Deposit					
202. Principal amount of new loan(s)				502. Settlement Charges to Seller (line 1400)					
203. Existing loan(s) taken subject to				503. Existing Loan(s) Taken Subject to					
204. Loan Amount 2nd Lien				504. Payoff of first mortgage loan					
205.				505. Payoff of second mortgage loan					
206.				506. Payoff					
207. Loan Assumption \$2,342,356.49				507. Loan Assumption					
208.				508.					
209.				509.					
<b>Adjustments for items unpaid by seller</b>				<b>Adjustments for items unpaid by seller</b>					
210. County Tax				510. County Tax					
211. HOA Dues				511. HOA Dues					
212. Sewer Dues				512. Sewer Dues					
213. Irrigation				513. Irrigation					
214. Rents 12/08/07 thru 12/31/07 \$19,716.16				514. Rents 12/08/07 thru 12/31/07					
215.				515.					
216.				516.					
217.				517.					
218.				518.					
219.				519.					
<b>220. Total Paid By/For Borrower \$2,462,072.65</b>				<b>520. Total Reduction Amount Due Seller</b>					
<b>300. Cash At Settlement From/To Borrower</b>				<b>600. Cash At Settlement To/From Seller</b>					
301. Gross Amount due from borrower (line 120) \$3,721,409.93				601. Gross Amount due to seller (line 420)					
302. Less amounts paid by/for borrower (line 220) \$2,462,072.65				602. Less reductions in amt. due seller (line 520)					
303. Cash From Borrower \$1,259,337.28				603. Cash To Seller					

Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires that HUD must develop a Special Information Booklet to help persons borrowing money to finance the purchase of residential real estate to better understand the nature and costs of real estate settlement services. Each lender must provide the booklet to all applicants from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. Lenders must prepare and distribute with the Booklet a Good Faith Estimate of the settlement costs that the borrower is likely to incur in connection with the settlement. These disclosures are mandatory.

Section 4(a) of RESPA mandates that HUD develop and prescribe this standard form to be used at the time of loan settlement to provide full disclosure of charges imposed upon the borrower and seller. These are third party disclosures that are designed to provide the borrower with pertinent information during settlement process in order to be a better shopper. The Public Reporting Burden for this collection of information is estimated average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. The information requested does not lend itself to confidentiality.

Exhibit No. 7  
Date: 5/12/09  
G. Shea  
T&T REPORTING



L. Settlement Charges								
700. Total Sales/Broker's Commission based on price					@ % =		Paid From	Paid From
Division of Commission (line 700) as follows:							Borrower's	Seller's
701.					to		Funds at	Funds at
702.					to		Settlement	Settlement
703.								
704. Transaction Fee					to			
800. Items Payable in Connection with Loan								
801. Loan Origination Fee %					to	Bonneville Mortgage Co.		
802. Loan Discount %					to			
803. Appraisal Fee					to			
804. Credit Report					to	Bonneville Mortgage Co.		
805. Lender's Inspection Fee					to			
806. Mortgage Insurance Application					to			
807. Tax Service Fee					to			
808. Underwriting Fee					to			
809. Flood Certification Fee					to			
810. Administrative Fee					to	StauCorp Mortgage Investors, LLC	POC (X)	\$23,400.00
811. Certified Copies					to	Bonneville Mortgage Co.		
812. Federal Express Charges					to	Bonneville Mortgage Co.		
813. Loan Closing Fee					to	Bonneville Mortgage Co.		
814. Reimbursement					to	Tom O'Shea		\$1,402.00
900. Items Required by Lender To Be Paid In Advance								
901. Interest from					to	@ \$0/day		
902. Mortgage Insurance Premium for months					to			
903. Hazard Insurance Premium for years					to			
1000. Reserves Deposited With Lender								
1001. Hazard insurance					months @		per month	
1002. Mortgage insurance					months @		per month	
1003. County Tax					months @	\$3,649.51	per month	
1004. HOA Dues					months @		per month	
1005. Sewer Dues					months @		per month	
1006. Irrigation					months @		per month	
1007. Rents					months @		per month	
1008. Other					months @		per month	
1011. Aggregate Adjustment								
1100. Title Charges								
1101. Settlement or closing fee					to	Idaho Title & Trust, Inc.		\$1,500.00
1102. Abstract or title search					to			
1103. Title examination					to			
1104. Title insurance binder					to			
1105. Document preparation					to			
1106. Notary fees					to			
1107. Attorney's fees					to			
(includes above items numbers:					)			
1108. Title insurance					to	Idaho Title & Trust, Inc.		
(includes above items numbers:					)			
1109. Lender's coverage						\$0.00/\$546.61		
1110. Owner's coverage						\$3,700,000.00/\$8,180.00		
1111. Escrow fee					to			
1112. CLTA 110.5					to	Idaho Title & Trust, Inc.		\$546.61
1200. Government Recording and Transfer Charges								
1201. Recording Fees					Deed \$15.00 ; Mortgage \$135.00 ; Rel	to Idaho Title & Trust, Inc.		\$150.00
1202. City/county tax/stamps					Deed ; Mortgage	to		
1203. State tax/stamps					Deed ; Mortgage	to		
1204. Release Fee					to	Idaho Title & Trust, Inc.		
1205. Electronic Doc Fee					to	Idaho Title & Trust, Inc.		\$20.00
1206. Courier/Messenger Fee					to	Idaho Title & Trust, Inc.		\$10.00
1300. Additional Settlement Charges								
1301. Invoice					to	Weiss & Weissman, Inc.		\$645.00
1302. Inspection					to	Essential Home Services		\$710.42
1303. Invoice					to	Michael A. Shiffman		\$12,145.00
1304. Invoice					to	Tom O'Shea		\$1,251.27
1305. Courtesy Closing Fee					to	Kristy Nguyen		\$150.00
1306. 2007 Property Taxes					to	Bonneville County Treasurer		
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)								\$18,530.30

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a completed copy of pages 1, 2 and 3 of this HUD-1 Settlement Statement.

Thomas O'Shea Trustee  
Thomas O'Shea, Trustee of the Trust of Thomas  
and Anne O'Shea dated December 30, 1998

Anne Donahue Trustee  
Anne Donahue, Trustee of the Trust of Thomas  
and Anne O'Shea dated December 30, 1998

High Mark Development, LLC  
By Benjamin D. Arave

SETTLEMENT AGENT CERTIFICATION

The 1001 Settlement Statement which I have prepared is a true and accurate  
account of this transaction - I have caused the funds to be disbursed in  
accordance with this statement.

Gordon D. Arave 12/19/07  
Settlement Agent Date

Warning: It is a crime to knowingly make false statements to the United  
States on this or any other similar form. Penalties upon conviction can include  
a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and  
Section 1010.

High Mark Development, LLC  
By Gordon D. Arave

Previous Editions are Obsolete

Page 3

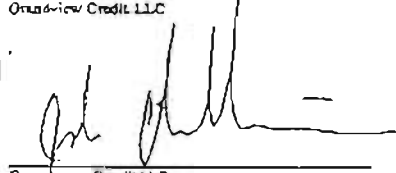
Form HUD-1 (3/86)  
Handbook 4305.2

## Additional Buyer/Borrowers &amp; Sellers

I have carefully reviewed the HUD-1 Settlement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a completed copy of pages 1, 2 and 3 of this HUD-1 Settlement Statement.

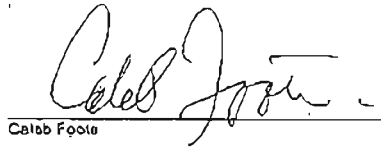
## Section D - Additional Buyer/Borrowers

Grandview Credit LLC



Grandview Credit LLC  
By Jack Chillum, Manager

Caleb Foote



Caleb Foote

Katie Larkin Donahue



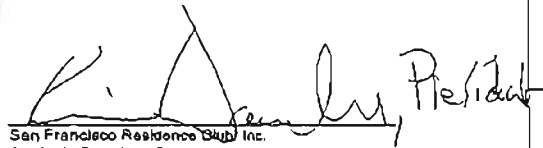
Katie Larkin Donahue

John Kevin Donahue



John Kevin Donahue

San Francisco Residence Club, Inc.



San Francisco Residence Club, Inc.  
By Kevin Donahue, President



San Francisco Residence Club, Inc.  
By Katie Donahue, Secretary

## Section E - Additional Sellers

M

757

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE )  
O'SHEA, Trustees of the Thomas )  
and Anne O'Shea Trust u/d/t DATED ) Consolidated  
NOVEMBER 2, 1998, et al., ) Case No. CV-08-4025  
Plaintiffs, )  
vs. )  
HIGH MARK DEVELOPMENT, LLC, an )  
Idaho limited liability company, )  
et al., )  
Defendants. )

COPY

As per request exhibits  
not provided

DEPOSITION OF JEFFREY L. NEEDS

TAKEN IN BOISE, IDAHO

FEBRUARY 12, 2009

REPORTED BY:

SHERI LUDIKAER FOOTE, CSR No. 90, RPR, CRR

Notary Public

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■ ONTARIO, OR  
541-881-1700

NORTHERN  
1-800-879-1700

■ COEUR D'ALENE, ID  
208-765-1700

■ SPOKANE, WA  
509-455-4515

1 A. Yeah, it might be. I mean, it could  
2 be -- I think Equitec was '85, '86, to  
3 probably '89, because from '89 I went to work for  
4 Hines in Los Angeles.

5 Q. And your resume indicates that was from  
6 1990 to 1992?

7 A. Yes, in Los Angeles.

8 Q. It states that you at that job provided  
9 property management and leasing services and it  
10 mentions a Mitsui Fudosan.

11 A. Yes, Mitsui Fudosan was the owner of  
12 the property and Hines did the management. We  
13 did the development, management, and leasing for  
14 the building.

15 Q. Okay.

16 A. And I was just -- I was an assistant  
17 manager at the time and I did property management  
18 and did some leasing support for our marketing  
19 group.

20 Q. So, let's split those up. When you  
21 talk about property management, what would  
22 property management consist of insofar as your  
23 duties at Equitec and also at Hines was  
24 concerned?

25 A. Property management is, you know,

1 essentially taking care of, you know, lease  
2 administration, taking care of contract  
3 administration for security services, contract  
4 services like electrical -- I mean, janitorial  
5 services, you know, the day-to-day operations of  
6 a building. Anything you would need in the  
7 building, whether it's cleaning carpet, cleaning  
8 the windows outside, taking care of the roof,  
9 taking care of hiring contract services to  
10 maintain systems, property, you know, general  
11 property management.

12 Q. Did you usually work with the property  
13 owner --

14 A. Yes.

15 Q. -- in executing those duties?

16 A. Yes.

17 Q. When you answer my questions, you need  
18 to wait until I finish the question. Sometimes  
19 it's difficult. I always tell clients when  
20 they're giving a deposition it's nothing like  
21 everyday speech between, you know, colleagues,  
22 friends and so forth.

23 A. Okay.

24 Q. So, I'll try to remind you of that.  
25 And I'll try not to interrupt you as well.

759

1 MR. COLETTI: She can't take both of  
2 you at the same time.

3 Q. (BY MR. ARMSTRONG) Your resume  
4 indicates that you worked from 1992 to 1994 as a  
5 property manager at Cushman & Wakefield.

6 A. Yes.

7 Q. It mentions property management and  
8 leasing services to the Dial Corporation.

9 A. Yes.

10 Q. And what is the Dial Corporation?

11 A. Dial Corporation is a company that  
12 owns, what would you call it, you know, Breck  
13 shampoo, a broad range of consumer products.

14 Q. I see. Was that in Los Angeles as  
15 well?

16 A. That was in Phoenix.

17 Q. Phoenix. And then from 1994 to 2004  
18 you were a senior property manager at Hines  
19 again; is that true?

20 A. Yes.

21 Q. And it states there you: "Provided  
22 management, leasing, construction management,  
23 acquisition and disposition duties to over  
24 4.9 million square feet of real estate and four  
25 separate ownerships."

1 A. Yes.

2 Q. As you were going through your property  
3 management jobs, did you receive any  
4 certifications or special training that would  
5 have been recognized?

6 A. Well, each state has their own  
7 licensing requirements from the standpoint of  
8 property management, leasing, selling of real  
9 estate. So, you know, when I was in Phoenix, I  
10 had an Arizona salesperson's license. When I was  
11 in California, I had a California salesperson's  
12 license.

13 Q. And a salesperson's license, is that  
14 different from a broker's license?

15 A. Yes.

16 Q. What's the difference?

17 A. I don't know the specific differences.  
18 I mean, generally a broker license is what you  
19 need to run a -- you can operate real estate  
20 basically on your own, you're not supervised. If  
21 you're a salesperson, then you're supervised  
22 underneath a broker, someone with a broker's  
23 license.

24 Q. Have you ever received your broker's  
25 license?

1 A. I did here in Idaho, yes.  
 2 Q. When did you receive that license?  
 3 A. 2004.  
 4 Q. It was in 2004, then, that you moved  
 5 here to Idaho to start Needs Real Estate  
 6 Services?  
 7 A. Yes.  
 8 Q. And that was from 2004, is that to the  
 9 present?  
 10 A. In October of 2007 I basically merged  
 11 my commercial activities into and started up the  
 12 Canyon County office for Colliers. So, I'm not a  
 13 principal in Colliers. I just, I guess I'm the  
 14 branch manager, so to speak, for the Canyon  
 15 County office.  
 16 Q. So, do you consider yourself  
 17 self-employed or are you employed by Colliers?  
 18 How does that work?  
 19 A. We're all independent agents.  
 20 Q. And Needs Real Estate Services, is that  
 21 a corporation? What kind of entity is that?  
 22 A. Yes, it's a corporation.  
 23 Q. And that was formed in?  
 24 A. 2004.  
 25 Q. The State shows that you were formed in

1 2005. Does that help refresh your memory? The  
 2 date of origination was December 5, 2005.  
 3 A. No, in 2004 I started off, it was  
 4 called Needs Commercial Real Estate Services.  
 5 And then I think maybe in '05 I changed -- it  
 6 still is Needs Commercial Real Estate Services,  
 7 but it's d/b/a Needs Real Estate Services. So,  
 8 maybe what you found was when I changed or did  
 9 the d/b/a from Needs Commercial to make it Needs  
 10 Real Estate.  
 11 Q. Okay.  
 12 A. So, there was a change after a period,  
 13 but I'm pretty sure I started Needs Real Estate  
 14 in '04.  
 15 Q. And you're the president of that  
 16 entity?  
 17 A. Yes.  
 18 Q. How many employees do you have?  
 19 A. Just me.  
 20 Q. Just yourself? Do you have a  
 21 receptionist?  
 22 A. No.  
 23 Q. Do you have a secretary?  
 24 A. No.  
 25 Q. Nobody that you supervise?

760

1 A. No.  
 2 Q. What is your current marital status?  
 3 A. Married.  
 4 Q. And did you grow up mainly here in  
 5 Idaho, then?  
 6 A. Mm-hmm.  
 7 Q. Is that a "Yes"?  
 8 A. Yes.  
 9 Q. Give me your best description of what  
 10 Needs Real Estate Services does.  
 11 A. When Needs Real Estate Services was  
 12 started, it was started to do, you know,  
 13 brokerage -- the selling of residential and  
 14 commercial businesses or real estate, and to do  
 15 leasing and to do property management and to do,  
 16 you know, development services and maybe do some  
 17 development on my own.  
 18 Q. Have you been a property developer?  
 19 A. I've got a couple of projects that I'm  
 20 trying to do but haven't finished them yet, you  
 21 know, still waiting to take off.  
 22 Q. Is one of those projects a correctional  
 23 facility?  
 24 A. No, it's a drug and alcohol rehab  
 25 facility

1 Q. And that's located in Eagle?  
 2 A. No, Nampa.  
 3 Q. Nampa? Okay. So, would you consider  
 4 yourself to be more of a developer or --  
 5 A. More of a commercial real estate  
 6 broker, you know, selling, leasing. More  
 7 transactions than development.  
 8 Q. What is the other project that you have  
 9 going right now in addition to the one in Nampa?  
 10 A. There's one called Bella Commons and  
 11 that's in Nampa also.  
 12 Q. Does Thomas O'Shea or any of the  
 13 Plaintiffs in this case, do any of those  
 14 individuals hold an interest in any of your  
 15 developments in Nampa?  
 16 A. No.  
 17 Q. How do you know Thomas O'Shea?  
 18 A. I know Tom O'Shea from when I lived in  
 19 San Francisco.  
 20 Q. Tell me about how you met him.  
 21 A. Through a friend. We have a mutual  
 22 friend in San Francisco.  
 23 Q. Who is that mutual friend?  
 24 A. Kris Lynds.  
 25 Q. Does Kris Lynds work for Countrywide

1 you've not met Kate Larkin Donahue?  
 2 A. No.  
 3 Q. You've not met John Kevin Donahue?  
 4 A. No.  
 5 Q. Have you done any leasing or any  
 6 property management work for San Francisco  
 7 Residence Club?  
 8 A. No.  
 9 Q. Have you ever been to the San Francisco  
 10 Residence Club?  
 11 A. No.  
 12 Q. So, other than the transaction that  
 13 we're going to talk about more in detail  
 14 throughout this deposition at 1675 Curlew, have  
 15 you had any other real estate or leasing or  
 16 commercial leasing transactions with the O'Sheas?  
 17 A. No.  
 18 Q. I am handing you a binder of exhibits  
 19 and we're going to be working our way through  
 20 that today. I need you to turn, if you will, to  
 21 Tab 47. And we will mark these after. They'll  
 22 be marked commensurate with the tabs that are in  
 23 that binder.  
 24 (Exhibit 47 marked.)  
 25 (Discussion held off the record.)

1 Q. (BY MR. ARMSTRONG) Can you identify  
 2 this document as the subpoena that was served on  
 3 you back in the September of 2008 time period?  
 4 A. It looks familiar, yes.  
 5 Q. What did you do when you received that  
 6 subpoena?  
 7 A. Put it on my desk.  
 8 Q. Did you look for the documents that are  
 9 identified in paragraphs 1 through 7 on pages 2  
 10 and 3 of the subpoena?  
 11 A. Yes.  
 12 Q. Did you call Greg Crockett or Sean  
 13 Coletti after you received this subpoena?  
 14 A. I don't remember if I called them, sent  
 15 them an e-mail, or -- I don't know if I -- when I  
 16 received the subpoena, I don't know if I  
 17 contacted them or not.  
 18 Q. Okay.  
 19 A. I don't remember.  
 20 Q. If you'll look at that first item on  
 21 page 2, it asks you to produce: "Any and all  
 22 documents relating to the purchase and sale of  
 23 property located at 1675 Curlew Drive, Ammon,  
 24 Idaho, 83406." What did you do to locate those  
 25 documents?

1 A. I went through my files and found every  
 2 document related to the transaction.  
 3 Q. Did you have any specific files set up  
 4 for this purchase and sale of this property?  
 5 A. Yes.  
 6 Q. And what kind of a file? A paper file?  
 7 A. A paper file.  
 8 Q. And was there a label on that file?  
 9 A. Yes.  
 10 Q. And how thick was that file?  
 11 A. There's probably two manila files,  
 12 maybe so thick (indicating.)  
 13 Q. Okay.  
 14 A. A half-inch thick.  
 15 Q. Did you copy them at that point?  
 16 A. Yes.  
 17 Q. What did you do after you copied them?  
 18 A. I scanned them and I put them in -- and  
 19 I put them on my computer into a file labeled  
 20 "Children's Center" is what I did.  
 21 Q. You didn't have a secretary or anybody  
 22 do that for you?  
 23 A. No.  
 24 Q. Item No. 2: "A copy of any listing  
 25 agreement or other agreement between you and/or

1 your company on one side and any of the following  
 2 on the other." And then it lists there the  
 3 Plaintiffs. Did I read that correctly?  
 4 A. Yeah.  
 5 Q. Do you have a listing agreement with  
 6 Mr. O'Shea?  
 7 A. No, there's no listing agreement.  
 8 Q. Is it just a verbal agreement that you  
 9 have with him?  
 10 A. There's not a -- with buyer and seller,  
 11 I mean -- I'm sorry, with the buyer, the O'Sheas,  
 12 I mean, there's no agreement you do. You go and  
 13 find a property. If they want to buy it, then  
 14 they do a purchase and sale agreement. So,  
 15 there's not a -- in this case there wasn't any  
 16 sort of representation agreement or listing  
 17 agreement between the buyer group or myself.  
 18 Q. So, nothing in writing?  
 19 A. No.  
 20 Q. Was there a verbal agreement that you  
 21 can identify where you were specifically asked  
 22 and then you accepted an offer by the O'Sheas to  
 23 act as their agent to find a property for them to  
 24 buy?  
 25 A. No, just a casual, if you, you know,



1 go and get financials from the tenant?  
 2 A. No, we would have done that without  
 3 Kris saying that.  
 4 Q. And what does he mean, "get financial  
 5 on the tenant"?  
 6 A. Financials, tax returns, a profit and  
 7 loss statement.  
 8 Q. Anything else?  
 9 A. No.  
 10 Q. Do you want to see a rent roll?  
 11 A. Well, that comes from the owner, not  
 12 the tenant.  
 13 Q. What else would come from the tenant  
 14 that you would be interested in seeing before you  
 15 would decide to make an investment decision? Are  
 16 tax returns and profit and loss statements it?  
 17 A. Yeah.  
 18 (Exhibit 52 marked.)  
 19 Q. (BY MR. ARMSTRONG) If you'll turn to  
 20 Tab 52.  
 21 A. (Witness complied.)  
 22 Q. Do you recognize that document?  
 23 A. Yes.  
 24 Q. And what is it?  
 25 A. It's a Purchase and Sale Agreement.

1 Q. And it's actually signed; is that  
 2 correct?  
 3 A. Yes.  
 4 Q. If you'll turn to the third page in  
 5 from the page 1.  
 6 A. So, page 4 going by the fax copy?  
 7 Q. Yes.  
 8 A. Okay.  
 9 Q. Paragraph 9 says: "Inspection/Due  
 10 Diligence." And there's a box checked underneath  
 11 the other boxes and it says: "The following  
 12 documents and materials shall be provided by the  
 13 Seller to the Buyer as part of the Buyer's  
 14 inspection/due diligence."  
 15 And it says: "Income and expense  
 16 statements for the 2006, year-to-date 2007,  
 17 through July, income and expense statement, aged  
 18 receivables report, copies of any appraisal or  
 19 phase 1 reports, list of all warranties on the  
 20 building and copy of the lease, 2005 and 2006  
 21 federal tax returns of tenant, and a current  
 22 balance sheet showing assets and liabilities."  
 23 Did I read that correctly?  
 24 A. Yes.  
 25 Q. So, you want to add to that list of tax

1 returns and profit and loss statements the  
 2 balance sheet as well?  
 3 A. We requested it in here but did not  
 4 receive it.  
 5 Q. That's your testimony, that you didn't  
 6 receive a balance sheet?  
 7 A. Yes.  
 8 Q. And if it was a condition of the  
 9 contract and you hadn't received it, did you  
 10 notify anyone that you hadn't received it?  
 11 A. No.  
 12 Q. Is there a reason why?  
 13 A. No.  
 14 Q. You didn't receive a balance sheet as  
 15 required under the real estate purchase contract  
 16 and did you have any conversation with Mr. O'Shea  
 17 about that issue?  
 18 A. No.  
 19 Q. You didn't have any discussion with  
 20 anyone about why you didn't receive a balance  
 21 sheet?  
 22 A. No.  
 23 Q. Did you think that the balance -- let  
 24 me ask you this: The language in that paragraph  
 25 of Tab 52, who wrote that language?

1 A. Paul Fife I think put the contract  
 2 together.  
 3 Q. Specifically with regard to Section 9  
 4 of that contract, who wanted those specific  
 5 financials?  
 6 A. Again, I don't know if that was Paul  
 7 Fife that put it in there. We might have  
 8 something in the letter of intent that maybe he  
 9 copied it over from the letter of intent into  
 10 this.  
 11 Q. So, that wasn't something that you had  
 12 specifically suggested?  
 13 A. I have a letter of intent that's pretty  
 14 standard that I sent this off on so that it could  
 15 have that on there.  
 16 Q. And this doesn't mention profit and  
 17 loss statements.  
 18 A. Yeah.  
 19 Q. Is there any reason why that's not in  
 20 there?  
 21 A. No.  
 22 Q. And Mr. O'Shea signed this document;  
 23 correct?  
 24 A. Yes.  
 25 Q. And did you read this prior to his

1 second day.

2 Q. Did Anne come with him?

3 A. No.

4 Q. Did anybody else come with him?

5 A. No.

6 Q. So, was it just you and Mr. O'Shea?

7 A. Yes.

8 Q. How long were you at the 1675 Curlew  
9 property during that visit?

10 A. I don't know. Maybe --

11 Q. Was it minutes or hours?

12 A. Oh, no, under an hour. That was for  
13 the site inspection and then obviously, we came  
14 back and drove through it a few times, but for  
15 the site inspection it probably would have been  
16 under an hour.

17 Q. So, what do you mean by "the site  
18 inspection"?

19 A. Walking into the building, walking  
20 around the property.

21 Q. Seeing the property?

22 A. Yeah.

23 Q. Making sure it exists?

24 A. Touching it, feeling it, and then also  
25 looking at the tenant to see what's going on

1 inside the business. And it was good to see that  
2 there were -- they had children in the rooms.  
3 They had several people out in the reception  
4 area. It was a very busy business.

5 And the O'Sheas liked the idea of a  
6 children's center type of business. And when we  
7 went there it was good to see that, you know,  
8 there were cars in the parking lot, lights were  
9 on, and there was lots of children and clients in  
10 there.

11 Q. All right. So, you were there for that  
12 site inspection for less than an hour?

13 A. Correct.

14 Q. Did you ask anyone to be able to sit  
15 down with the tenant or a tenant's representative  
16 to talk about their business, their revenues?

17 A. We had asked to meet with Matt Smith  
18 and we were told that he wouldn't be available to  
19 meet with us. But I think we -- I was trying to  
20 remember if we met with Marc Weinpel or not. No,  
21 we didn't meet with anybody at that time.

22 Q. After that, when was the next time that  
23 you visited the property?

24 A. I don't remember. I don't remember if  
25 I went down again before the closing. I

1 remember, like I said, we sent the person to do  
2 the inspection.

3 Q. Was that after you did your own site  
4 inspection?

5 A. The date on the inspection is on that  
6 flash drive I sent to you. You've got a copy of  
7 the building inspection and the date. I think it  
8 was September or October, but I -- somewhere in  
9 that time frame, but I don't -- I don't know if  
10 we went back down to the property again before  
11 closing.

12 Q. Did you seek to meet with Matt Smith or  
13 Marc Weinpel after that first site visit or site  
14 inspection?

15 A. No.

16 Q. Did Mr. O'Shea?

17 A. I don't think so, but I don't know for  
18 sure.

19 Q. Did you know the phone number for The  
20 Children's Center?

21 A. We didn't look. I mean, we looked on  
22 their website and stuff like that. So, it was  
23 available. We knew where to get it.

24 Q. So, it was readily accessible?

25 A. Yes.

1 Q. So, you feel like a communication with  
2 The Children's Center would have been readily  
3 accessible or available?

4 A. Yeah, other than being told that, you  
5 know, not to bother the tenant.

6 Q. But from your testimony, you were told  
7 not to bother the tenant during your walk-through  
8 because you didn't want to interrupt any  
9 counseling that may have been going on. Is that  
10 what you understood that to mean?

11 A. Yeah, and that Matt Smith wasn't  
12 available for whatever reason.

13 Q. All right. On Tab 20, that second  
14 page, did you prepare that document?

15 A. Yes.

16 Q. What is that?

17 A. Essentially it's a summary of the rent  
18 based on what the lease said, and also putting in  
19 there what the debt service was based on the  
20 current loan on the building that was going to be  
21 assumed, showing a cash flow and an expected  
22 return on their investment.

23 Q. What did you look at to prepare this  
24 document?

25 A. The lease and the deed of trust or the

1 note, but one of the instruments that showed what  
2 the payment was for the mortgage on the building.  
3 It's pretty simple. That was one of the nice  
4 things about the building, it was a triple net  
5 lease. So, here's their net payment. They take  
6 care of all of the expenses on the property. So,  
7 you take their lease rate, back out the debt  
8 service. So, it's a pretty simple document.

9 Q. Anything else that you would have  
10 looked at? Any financial information of The  
11 Children's Center?

12 A. Not for this. This is purely taking  
13 their rent and backing out their debt service and  
14 here's their cash return.

15 Q. Up at the top there's a box that  
16 states: "Residual Value." Do you see that?

17 A. Yes.

18 Q. And a "Residual Cap." Do you know what  
19 that is?

20 A. Yes.

21 Q. What is that?

22 A. That's applying an expected cap rate at  
23 some future point in time where you may want to  
24 sell the building.

25 Q. Is that when you capped out of your

1 investment return or --

2 A. Yeah, different -- there's a lot of  
3 different ways to look at it, but essentially,  
4 you know, a cash on cash return is something that  
5 you cash in and here you get back out, so your  
6 cash on cash is easy to compute. But some people  
7 like to see an internal rate of return. So, in  
8 order to get an internal rate of return you've  
9 got to have a residual value at some point in the  
10 future. And so, we just delineated a 10-year  
11 investment period if I remember right, and then  
12 projected a cap rate in 10 years at 8-1/2 and  
13 what the income would be at that time based on  
14 the lease.

15 Q. So, at that cap rate, does that cap  
16 rate in that residual value box, does that have  
17 the same meaning as the cap rate that we looked  
18 at on the LoopNet ad?

19 A. It's used for the same purpose.

20 Q. And why does yours reflect 8-1/2  
21 percent and the one in the LoopNet ad reflect an  
22 8 percent cap rate?

23 A. The cap rates during this time period  
24 of the transaction were, given where the market  
25 was, historically were low. And so, I just

1 computed a higher cap rate into the future to be  
2 more conservative on a projection.

3 Q. So, what did you use to base that  
4 increase or what did you base those assumptions  
5 on to increase that to 8-1/2 percent?

6 A. Just my own intuition.

7 Q. You didn't consult any kind of a  
8 periodical?

9 A. No.

10 Q. Did you consult any kind of real estate  
11 appraiser or anybody like that that could give  
12 you --

13 A. No.

14 Q. So, it was just a gut feeling as to  
15 what the residual cap -- the cap rate would be?

16 A. Correct.

17 Q. I just want to make sure I'm clear.

18 That residual cap of 8-1/2 percent, is that the  
19 same as a capitalization rate that we saw in the  
20 LoopNet ad?

21 A. Yes.

22 Q. So, does that mean, 8-1/2, does that  
23 mean that's better than an 8 percent cap rate,  
24 more positive, meaning it's going to return more  
25 on your money?

1 A. With capitalization rates, the higher

2 the rate, the -- as the capitalization rate  
3 increases, the value of the property decreases.  
4 As the capitalization rate decreases, the value  
5 of the property increases.

6 Q. So, your investment improves as the cap  
7 rate goes down?

8 A. Correct.

9 Q. And contrary wise, the investment gets  
10 worse as the cap rate goes up?

11 A. Correct.

12 Q. Or loses value?

13 A. Yes. But again, it's a market  
14 indicator and cap rates had been low over the  
15 last couple of years.

16 Q. As a representative for Mr. O'Shea, how  
17 much did you rely on that 8 percent cap rate that  
18 was stated in that LoopNet ad?

19 A. Very little. I relied mostly on the  
20 lease.

21 Q. When you say you relied on the lease,  
22 are you talking about what was stated in the  
23 lease agreement?

24 A. What's stated in the lease agreement,  
25 the fact that the tenant we had been told was a

1 strong tenant, had been paying every monthly rent  
2 on time, in a timely manner, had been a great  
3 tenant. So, that had more weight than a cap  
4 rate.

5 Q. Who told you that, that the tenant  
6 was --

7 A. It was marked as that in the LoopNet  
8 advertisement and we were told that by Paul Fife.

9 Q. When did Paul Fife tell you that?

10 A. At some point during the time when we  
11 were looking at -- before closing.

12 Q. Would it have been prior to receiving  
13 tax returns?

14 A. It could have been. I mean, I don't  
15 remember how the timing went.

16 Q. How would he have told you that? Would  
17 it have been over the phone or would it have been  
18 in an e-mail?

19 A. A phone conversation.

20 Q. Okay.

21 A. We met with -- even with Tom O'Shea and  
22 I, we did go down to Idaho Falls in September.  
23 We also met with Paul Fife at that time and had  
24 Paul go over with us the tenant, the history of  
25 the tenant, and information like that.

1 Q. Now, let's go to that meeting. Was  
2 that prior to your site inspection?

3 A. It was during the same trip. I don't  
4 remember if we had met with Paul first and then  
5 went and looked at the building or not.

6 Q. You met with Paul Fife at his office to  
7 do that?

8 A. Yes.

9 Q. How long did you meet with Paul Fife?

10 A. We might have been with him an hour.

11 Q. Give me your fullest recollection of  
12 your conversation.

13 A. My fullest recollection is just  
14 essentially it was a discussion about the tenant,  
15 information about the tenant, the property, the  
16 market. Nothing sticks out specifically about  
17 the conversation other than just a general  
18 discussion again about the building, the  
19 property, about the developer, the contractor,  
20 Arave Construction, those types of things.

21 Q. So, it was a general discussion about  
22 the tenant?

23 A. Yes.

24 Q. It was just a general discussion about  
25 what the circumstances were surrounding this

1 building at 1675 --

2 A. Right. Sorry.

3 Q. Did you talk with him at that time that  
4 there was another lease that The Children's  
5 Center had in Pocatello, Idaho?

6 A. I don't know if we talked about it in  
7 that conversation. I don't remember about  
8 Pocatello.

9 Q. Prior to closing on this property, did  
10 you or Mr. O'Shea know that The Children's Center  
11 also leased property in Pocatello, Idaho?

12 A. Yes.

13 Q. How did you find that out?

14 A. Either LoopNet, because that property  
15 was listed by Paul Fife on LoopNet -- actually, I  
16 don't remember if it was listed by Paul. It was  
17 on LoopNet. And so, I found it on LoopNet and we  
18 talked about it with Paul. And Paul said that  
19 they had been paying fine in Pocatello and in  
20 Idaho Falls as far as he knew. So, that's --

21 Q. So, he said as far as he knew the  
22 tenant was paying its rent?

23 A. Yeah. I don't know the specific words.

24 Q. Well, that's what you testified to.

25 A. Well, I mean, if you're going to ask me

1 to go back a year in memory, I'm not going to --

2 generally we talked about the tenant and that

3 they were good paying rent and had been in

4 business for a number of years and they were --

5 they did good in the location right next to the

6 building. And Gordon built this bigger building

7 for them because their business was expanding and  
8 doing good.

9 Q. And that was information that you  
10 gained from Paul Fife?

11 A. Yes.

12 Q. Did you meet with Gordon Arave at all  
13 during that time?

14 A. No.

15 Q. Did you meet with Gordon Arave at any  
16 time prior to closing?

17 A. I don't think so.

18 Q. Did you meet with anyone associated  
19 with The Children's Center prior to the closing?

20 A. I don't believe so.

21 Q. Did you inquire of anyone as to how the  
22 tenant was doing in the Pocatello, Idaho,  
23 property?

24 A. I don't recall. I don't remember.

25 Q. Did you know the relationship of Gordon

1 document that's been marked as Exhibit No. 58 to  
2 your deposition, do you recognize that document,  
3 sir?

4 A. (Reviewing document.) Not  
5 specifically. We received and looked at a lot of  
6 estoppels during this time period. I don't know.

7 Q. Do you know who would have drafted  
8 Exhibit No. 58?

9 A. No.

10 Q. The acknowledgement box, you don't know  
11 if that is something that --

12 A. Acknowledgement box?

13 Q. Just on the back, the second to the  
14 last page.

15 A. (Reviewing document.)

16 Q. Do you see the box?

17 A. Yeah.

18 Q. You don't know who drafts their  
19 estoppels like that?

20 A. No.

21 (Exhibit 13 marked.)

22 Q. (BY MR. ARMSTRONG) If you will turn to  
23 Tab 13 and keep Exhibit No. 58 in front of you.

24 A. (Witness complied.)

25 Q. This is a letter that was from my

1 Exhibit No. 58.

2 A. Okay.

3 Q. "These concerns were focused on  
4 paragraphs 1, 4, and 5 of the estoppel  
5 certificate." And if you'll look at Exhibit  
6 No. 58, paragraph 1, as you look in the second  
7 paragraph of paragraph 1, this estoppel states:  
8 "A true, complete, and accurate copy of the Lease  
9 and all amendments thereto are attached hereto as  
10 Exhibit 1."

11 It then states: "The term of the Lease  
12 commenced on June 19, 2006, and terminates on  
13 June 19, 2016, and is renewable at option of  
14 tenant for an additional ten (10) year term."

15 Did I read that correctly?

16 A. Yes.

17 Q. It then states: "There is an option to  
18 buy in favor of tenant which option may not be  
19 exercised before June 12, 2009."

20 Did I read that correctly?

21 A. This says "June 19."

22 Q. I'm sorry, "June 19, 2009." Thank you  
23 for that correction. With that change, is that  
24 correct?

25 A. Yes.

1 office sent to Paul Fife dated September 28,  
2 2007. Prior to the closing on the property at  
3 1675 Curlew, did you ever see this letter?

4 A. I don't recall. I don't know.

5 Q. In the second paragraph it says: "The  
6 estoppel certificate provided to us on  
7 September 25, 2007, was presented to the tenant,  
8 The Children's Center, Inc., and its legal  
9 counsel, Marc Weinpel."

10 Did I read that correctly?

11 A. Yeah.

12 Q. The exhibit we looked at, Exhibit  
13 No. 58, does that refresh your memory as to  
14 Exhibit No. 58 being the estoppel certificate  
15 being referenced in this letter of September 28,  
16 2007?

17 MR. COLETTI: Objection, speculative.

18 THE WITNESS: I don't remember.

19 Q. (BY MR. ARMSTRONG) After that sentence  
20 that I just read to you, my letter states:

21 "After forwarding the estoppel to Mr. Weinpel for  
22 his client's review and signature, I spoke with  
23 Mr. Weinpel, who voiced several concerns about  
24 the estoppel." And I'll represent to you that  
25 the estoppel being referenced there is, in fact,

1 Q. Then it says: "Said option price will  
2 be based upon an agreed upon MAI appraisal."

3 Did I read that correctly?

4 A. Yes.

5 Q. If you look at paragraph 4, it's a  
6 lengthy paragraph. I won't read all of it,  
7 paragraph 4 of Exhibit No. 58. It states what  
8 the insurance requirements are of the tenant  
9 related to the property at 1675. Is that a fair  
10 assessment in your view?

11 A. It relates to the insurance?

12 Q. Or what the insurance coverage  
13 requirements are of the tenant.

14 A. Are you talking about paragraph 4?

15 Q. Paragraph 4, yes.

16 A. This is more discussing that the lease  
17 is a triple net lease and what's typically  
18 covered and not covered with a triple net lease.  
19 It's not specific to -- insurance is part of it,  
20 but it also talks about common area maintenance,  
21 repair. There's several things outlined in here.

22 Q. Fair enough. If you look at the last  
23 five lines of that paragraph, it says that  
24 essentially the tenant is "to pay for all  
25 property insurance required by Landlord or its

1 Q. "These concerns were focused on  
2 paragraphs 1, 4, and 5 of the estoppel  
3 certificate," which we've looked at, "where  
4 representations are made about the option to  
5 purchase being based upon an 'agreed upon' MAI  
6 Appraisal, the tenant's obligation to pay  
7 property management fees, and the tenant's  
8 obligation to carry insurance coverage for  
9 property damage with 100 percent replacement cost  
10 coverage and for repair of roofs and  
11 foundations."

12 Did I read that correctly?

13 A. Yes.

14 Q. Then it says: "Mr. Weinpel informed me  
15 that his client does not carry such coverage, but  
16 that it does carry commercial and liability  
17 coverage, in which the combined single limit is  
18 not less than \$1,000,000 per accident or  
19 incident."

20 Did I read that correctly?

21 A. Yes.

22 Q. I then state: "Moreover, Mr. Weinpel  
23 indicated that the lease agreement does not state  
24 that the MAI Appraisal be 'agreed upon' and does  
25 not require his client to carry the referenced

1 insurance coverage or to pay the referenced  
2 property management fees."

3 Did I read that correctly?

4 A. Yes.

5 Q. Did Paul Fife ever relay this  
6 information to you relating to the tenant's  
7 inability or not wanting to sign an estoppel that  
8 does not comport with what the lease agreement  
9 says?

10 A. I think that there was some  
11 conversations about in general the tenant's  
12 concern with the definition of the value of the  
13 building, whether it was an MAI appraisal or not.  
14 And there were, I do remember, that the tenant --  
15 one of the issues with this transaction through  
16 the whole process was the tenant acknowledging  
17 what "triple net lease" meant in terms of what  
18 they paid for, whether it's the property  
19 management fee, a specific type of insurance.  
20 So, just in general, that was the dialogue of,  
21 you know, it was trying to get them to agree that  
22 this is what they're paying for.

23 They were already paying, based on  
24 statements we've received, that the -- they were  
25 already paying CAM charges. And that CAM charge

767

1 was maybe \$14,000 something a month, and that  
2 that \$14,000 was to cover taxes and insurance and  
3 stuff. So, our point was: "You're already  
4 paying this. We just want to define, what are  
5 you paying? What's in that CAM charge?" So,  
6 that's all we were looking for.

7 So, there was a discussion with Paul  
8 about how to clean that up or clarify that prior  
9 to closing. Because we didn't want to come in,  
10 or the O'Sheas didn't want to come in as the new  
11 owner and all of a sudden they've got a conflict  
12 with their new tenant. So, we were trying to  
13 clarify that before closing so it would be clean  
14 when the new ownership took over.

15 Q. I think I saw some e-mails where  
16 there's a reference by I think it's Kate Donahue  
17 where she states that: "If we clean this up,  
18 that will take away any 'interpretation' under  
19 the lease."

20 A. Yeah.

21 Q. Do you remember that discussion?

22 A. Yeah, that falls in line with what I  
23 just said. There was -- from the ownership  
24 perspective, they wanted to just make sure  
25 that -- we saw they were making these \$14,000

1 payments a month and we wanted to have it  
2 clarified what was in that so there was no -- you  
3 know, they did not want to have a dispute with  
4 their new tenant as soon as they bought the  
5 building.

6 Q. All right. Even though it wasn't  
7 stated specifically in the lease, you felt that  
8 was the spirit of what the lease said?

9 A. Correct.

10 Q. Was there anything else other than this  
11 issue with regard to what "triple net" means that  
12 continued as part of the dialogue?

13 A. The triple net was an issue and their  
14 option to purchase.

15 Q. The tenant's option to purchase?

16 A. Correct.

17 Q. How important, how critical of an issue  
18 was the option to purchase in Mr. O'Shea's mind,  
19 to the extent you know?

20 A. I think it was important. I don't know  
21 to what degree. You'll have to ask him. I don't  
22 remember what the, you know, what -- I don't know  
23 if it would kill the transaction or not if we  
24 didn't get that removed.

25 Q. So, you don't know whether it would

1 Tab 48, it contains all of the signed addenda.

2 A. (Witness complied.) Well, going back  
3 to your questions related to the contingencies,  
4 there are items on the original PSA, the Purchase  
5 and Sale Agreement, and then also items in  
6 Addendum 2.

7 Q. And those contingencies, then, would be  
8 removed if the tenant came back with a revised  
9 tenant estoppel certificate as suggested in your  
10 letter at Tab 1? Is that a fair statement?

11 A. Well, just as a general comment, that  
12 before the contingencies are removed, we have to  
13 resolve these two issues.

14 Q. And the two issues being identified in  
15 paragraphs that are numbered 1 and 2?

16 A. Correct.

17 Q. And one of those conditions is that the  
18 tenant has to acknowledge "that management fees  
19 and insurance costs of landlord are 'Triple Net'  
20 charges and paid for by tenant"; correct? I  
21 mean, that's what you're saying in the letter?

22 A. Well, I know, but you keep saying "has  
23 to" and I think here we were suggesting --

24 Q. Well, I'll use your words: "Tenant  
25 must acknowledge that management fees and

1 insurance costs of landlord are 'Triple Net'  
2 charges and paid for by tenant."

3 A. That's what it says.

4 Q. All right. The other one that they've  
5 got to do is agree that the MAI appraisal --  
6 well, let's read your words again. Paragraph 2:  
7 "The value being based solely upon an MAI  
8 appraisal is unsatisfactory. Buyer had  
9 originally interpreted this to be a mutually  
10 accepted MAI, but per Tenant's prior Estoppel  
11 change, this continues to be open to  
12 interpretation. Buyer appreciates Seller's  
13 willingness to indemnify if the price is below  
14 \$3,700,000, but what if the value is \$4 million  
15 and Tenant presents an MAI for \$3.7 million?  
16 This clause gives Tenant complete control over  
17 the asset."

18 Did I read that correctly?

19 A. That's what it says.

20 Q. All right. So, you're wanting again  
21 the tenant in the estoppel certificate that was  
22 supplied either by you or someone on Mr. O'Shea's  
23 side to agree to provisions that were not stated  
24 in the lease; is that correct?

25 MR. COLETTI: Objection, improper. **768**

1 characterizing the testimony.

2 THE WITNESS: It's a negotiation we're  
3 trying to define. We're not stating whether it  
4 was in or not in the lease. These are things  
5 that we wanted to have clarified before closing.

6 Q. (BY MR. ARMSTRONG) Okay. Items that  
7 are subject to interpretation, correct?

8 A. Correct.

9 Q. All right. So, based on your  
10 interpretation of the lease and Mr. O'Shea's  
11 interpretation of the lease, management fees are  
12 required to be paid under the lease agreement  
13 because it's a triple net lease; correct?

14 A. True. The lease -- I think if you look  
15 in the lease, I think it specifically says it's a  
16 triple net lease.

17 Q. Okay.

18 A. And so, it's an industry standard that  
19 a triple net lease would encompass management  
20 fees, insurance, roof. There's a lot of  
21 different definitions for a triple net lease.

22 Q. Okay.

23 A. Which is why we were trying to get it  
24 clarified up front.

25 MR. ARMSTRONG: Let's try this again

1 Will you read back my question, please.

2 (Record read back.)

3 THE WITNESS: Our interpretation of a  
4 triple net lease means that management fees,  
5 insurance, expenses for operating the property  
6 are part of tenant's cost.

7 Q. (BY MR. ARMSTRONG) Okay.

8 A. And because we did not want to clash  
9 with tenant afterwards, we were trying to get it  
10 defined up front.

11 Q. And if the tenant was not willing to  
12 agree to your interpretation of the lease as it  
13 relates to -- at least as it relates to the MAI  
14 appraisal, strike that. -- at least as it  
15 relates to the management fees being part of the  
16 triple net component of the lease, the deal was  
17 off? Was that a deal killer?

18 A. I don't know if it was a deal killer or  
19 not. Again, we were trying to just clarify what  
20 does the triple net lease expense -- what's in  
21 it?

22 Q. Okay.

23 A. We put some of our terms in it, but all  
24 we wanted back was a clear definition. It  
25 doesn't mean it was a deal killer. It just means

1 the terms to put into it. I mean, I would draft  
2 it and he would see it and tell me to make  
3 whatever changes there are that he wants to make  
4 changes to. But at the end of the day, it's him  
5 signing the letter of intent. It's him  
6 signing -- all of the pertinent documents were  
7 all signed by him.

8 Q. Sure. And I didn't mean in my question  
9 that you had authority to sign --

10 A. Well, that's what I was --

11 Q. And I appreciate that clarification.  
12 But you were acting for Mr. O'Shea and not for  
13 anybody else when you were talking about, when  
14 you were having discussions and conversations --

15 A. Yes.

16 Q. -- relating to this property; is that  
17 correct?

18 A. Yes.

19 (Exhibit 16 marked.)

20 Q. (BY MR. ARMSTRONG) Go to Tab 16.

21 A. (Witness complied.)

22 Q. As you mentioned, it's a letter of  
23 intent. Do you recognize that as the letter of  
24 intent in this case?

25 A. Yes.

1 MR. COLETTI: 16?

2 MR. ARMSTRONG: Yes.

3 Q. (BY MR. ARMSTRONG) And is that your  
4 signature on the last page?

5 A. Yes.

6 Q. And then that copy is signed by both  
7 Mr. Arave and Mr. O'Shea; correct?

8 A. Yes.

9 Q. As you were working for Mr. O'Shea on  
10 this matter, what did you understand or who did  
11 you understand to be the seller in this case?

12 A. I don't know at the time of drafting  
13 this letter -- or sending this letter of intent  
14 off if we knew specifically who the owner was.

15 Q. I see.

16 A. Paul Fife had a listing. And so, we  
17 asked Paul Fife to present this letter of intent  
18 to the owner.

19 Q. Okay.

20 A. So, at that time I don't know if we  
21 knew specifically who the owner was.

22 Q. How about thereafter as you were  
23 getting into negotiations and as estoppel  
24 certificates were being exchanged and so forth,  
25 did you come to understand that it was High Mark

1 Development that was the owner of the property?

2 A. I think we generally just knew that it  
3 was Gordon Arave. Whether it was High Mark or  
4 Arave Construction, I don't think we  
5 distinguished between them.

6 Q. And is that because of conversations  
7 that you had with Paul Fife, that he would refer  
8 to the seller as Gordon Arave?

9 A. Yeah, I just -- I mean, I don't know  
10 specifically why. I just think in general we  
11 just always thought of the owner as being Gordon  
12 Arave.

13 Q. So, you don't base that on any  
14 documents that you saw necessarily?

15 A. No, just kind of remembering, just a  
16 recollection of, you know, of our thought. I  
17 mean, I think later on in subsequent documents we  
18 were able to define who the ownership was of the  
19 building, but I think initially and through it we  
20 always thought Gordon Arave was the owner.

21 Q. If you'll look at page 2 at Tab 16  
22 under the category "Estoppels" it says: "Seller  
23 shall deliver to Buyer an Estoppel for the Tenant  
24 10 days prior to Closing." And it says: "Should  
25 the information provided on the estoppel differ

1 from the information provided by Seller, Buyer  
2 shall have the option to terminate the Agreement  
3 and receive full refund of Earnest Money. The  
4 form of estoppel shall be attached to the  
5 Agreement."

6 Did I read that correctly?

7 A. Yes.

8 Q. Do you know why once it was discovered  
9 at least from Mr. O'Shea's standpoint that the  
10 estoppels were not true, did you ever have a  
11 discussion with Mr. O'Shea as to why he didn't  
12 seek to terminate the agreement as allowed under  
13 the real estate purchase contract?

14 A. First of all, you're saying the  
15 estoppel being true. I mean, we had a signed  
16 estoppel that reflected certain things. And  
17 based on that estoppel and information on that  
18 estoppel, that it was -- all of the agreements  
19 and everything was in place, that all rent had  
20 been paid and everything, that it was -- you  
21 know, Tom made the decision to go ahead and close  
22 on the transaction.

23 Q. But my question is more focused on the  
24 time. Because the contract identifies what the  
25 option is for the buyer to do if the information



1 Q. (BY MR. ARMSTRONG) If you'll look at  
2 15, this is an e-mail. Can you identify this as  
3 an e-mail to blasket@pacbell.net?

4 A. Yes.

5 Q. Is that Tom O'Shea's e-mail address?

6 A. Yes.

7 Q. And the other person that this was sent  
8 to is shiffaw@aol.com; correct?

9 A. Yes.

10 Q. The date of this is October 19, 2007.  
11 And your e-mail states: "Attached is the latest  
12 estoppels signed by tenant."

13 Do you recall sending -- first of all,  
14 which estoppels -- did you send more than one  
15 estoppel with this e-mail?

16 A. I don't know. I mean, there's four  
17 pages listed above. Whether that's four  
18 estoppels or -- probably an estoppel. Whether  
19 it's one page or four pages, I don't know. It  
20 may have a fax cover page. I don't know what's  
21 all on those pages.

22 Q. It says: "Please note that the tenant  
23 has released its option to purchase the  
24 property."

25 Did I read that correctly?

1 A. Yes.

2 Q. And that was done in the October 17,  
3 2007, estoppel certificate that's at issue in  
4 this case. Do you understand that?

5 A. I don't know the date of it, but there  
6 was an estoppel where the tenant had done that.  
7 (Exhibit 22 marked.)

8 Q. (BY MR. ARMSTRONG) If you'll look at  
9 Tab 22.

10 A. (Witness complied.)

11 Q. If you'll look under paragraph 2, it  
12 says: "The lease was amended on October 17,  
13 2007, by redacting and releasing the option to  
14 purchase stated in Recital B of the Lease."

15 Did I read that correctly?

16 A. Yes.

17 Q. And was that the basis for you stating  
18 to Tom O'Shea: "Please note that the tenant has  
19 released its option to purchase the property"?

20 A. I believe so.

21 Q. Did you ever ask what consideration was  
22 given in order to release that option?

23 A. I asked Paul Fife, "Why did they give  
24 that up?" Something along that line.

25 Q. When did you ask him that?

770

1 A. Around the time we got this.

2 Q. So, prior to closing?

3 A. Yes.

4 Q. And was that a phone conversation?

5 A. I believe so.

6 Q. Did you initiate the call or did Paul  
7 Fife?

8 A. I don't recall.

9 Q. And how long was the conversation?

10 A. I don't know.

11 Q. Now, give me your fullest recollection  
12 of that conversation.

13 A. I asked him why they did it. And I --  
14 I believe that he said that the reason they did  
15 it was because Gordon Arave was going to help  
16 them with the Pocatello building or paid them --  
17 you know, I can't remember if it was the  
18 Pocatello building or paid them some  
19 consideration. I can't remember which.

20 Q. So, it's possible that Paul Fife told  
21 you that Gordon Arave paid --

22 A. Either there was consideration paid  
23 or --

24 THE COURT REPORTER: I'm sorry, you're  
25 not letting him finish the question.

1 Question: "So, it's possible that Paul  
2 Fife told you that Gordon Arave paid --

3 Q. (BY MR. ARMSTRONG) -- consideration or  
4 something of value to --

5 A. Yeah, or was --

6 Q. You need to let me finish so she can  
7 get it down on the record.

8 A. Sorry.

9 Q. -- that Mr. Arave paid consideration to  
10 the Children's Center to release that option?

11 A. Yes, or it was something where Gordon  
12 was going to help them with the Pocatello  
13 building. I can't remember which.

14 Q. Did you have a conversation with  
15 Mr. O'Shea about that conversation with Mr. Fife?

16 A. I did. And again, it would have  
17 been -- the same message would have been relayed,  
18 but I don't remember which one, whether it was  
19 helping the Pocatello or if there was  
20 consideration paid.

21 Q. Did you inquire of the Children's  
22 Center or of anybody else as to what form of  
23 consideration that was?

24 A. No.

25 Q. Did Mr. O'Shea, to your knowledge?

1 Q. This was a document in your file. This  
2 is a Borrower Information Form. Do you recognize  
3 that?

4 A. I don't.

5 Q. Do you know if you filled one of these  
6 out for Mr. O'Shea or any of the other ownership  
7 group?

8 A. I did not.

9 (Exhibit 30 marked.)

10 Q. (BY MR. ARMSTRONG) Go to Tab 30.

11 A. (Witness complied.)

12 Q. This is an e-mail from Paul Fife to you  
13 dated October 4, 2007. Do you recognize that as  
14 such?

15 A. Yeah.

16 Q. He states: "Jeff, we have made changes  
17 to item 1 and 4 which should be agreeable with  
18 the O'Sheas. We don't have this signed yet but  
19 wanted to have it reviewed before we sent it for  
20 signatures. Get right back to me if you can.  
21 Paul."

22 Do you remember having a conversation  
23 with Mr. O'Shea about this particular --

24 A. Like I said previously, there were a  
25 lot of estoppels going back and forth. And so,

1 specifics on any of them I'm not going to  
2 remember very well.

3 Q. If you'll turn to the last page of the  
4 document attached to that, it's a form or a draft  
5 of an Indemnification of Buyer. Do you see that?

6 A. Yes.

7 Q. Did Mr. O'Shea request that Mr. Arave  
8 at High Mark as an entity indemnify the buyer on  
9 the option to purchase that was in the lease  
10 agreement?

11 A. I don't remember. I don't recall if  
12 that came from O'Shea or if it was something that  
13 Arave thought would be a good option in terms of  
14 the lease with the option to purchase.

15 Q. Okay.

16 A. So, I don't know which side that came  
17 from.

18 Q. Did you consider that offer to  
19 indemnify to be part of the negotiations to try  
20 to get this transaction to occur?

21 A. I think at that time it was helpful. I  
22 think it was helpful to have that indemnification  
23 because of the concern with the option to  
24 purchase.

25 Q. Was it Mr. O'Shea's preference to just

1 have the option released as opposed to having it  
2 indemnified by the seller?

3 A. I don't remember. I don't remember  
4 that.

5 Q. Did you ever have a discussion with him  
6 as to what he would prefer?

7 A. Well, his preference would be to have  
8 the option be gone.

9 Q. No doubt in your mind?

10 A. Well, I'm not going to speak without  
11 doubt for Tom, but I think it was always better  
12 if that option was not there.

13 (Exhibit 31 marked.)

14 Q. (BY MR. ARMSTRONG) If you'll turn to  
15 Tab 31.

16 A. (Witness complied.)

17 Q. This is a public record corporation  
18 warranty deed for the 1675 property that was in  
19 your file. Did you ever see this warranty deed  
20 prior to the closing on the 1675 property?

21 A. I don't remember it.

22 Q. Do you see where the signature lines  
23 are?

24 A. Yes.

25 Q. And you see that there are two entities

1 listed there, Arave Construction Company and  
2 Arave Brothers, LLC?

3 A. Yes.

4 Q. Did you know that there was an Arave  
5 Brothers, LLC, entity that was related to this,  
6 either prior or currently related to this  
7 building prior to the closing?

8 A. I don't -- I don't recall. I don't  
9 think so.

10 (Exhibit 32 marked.)

11 Q. (BY MR. ARMSTRONG) If you'll turn to  
12 Tab 32.

13 A. (Witness complied.)

14 Q. It's an e-mail from you to Mr. O'Shea  
15 dated October 24th. It says: "Tom, Carrie is  
16 your title rep. Please contact her and begin the  
17 process of getting her your 1031 information."

18 Who is Carrie?

19 A. She was the title rep with Pioneer  
20 Title.

21 Q. Is she a person that you use on a  
22 regular basis for closings?

23 A. No.

24 Q. Her name is Carrie Homburg-Redovian?

25 A. Mm-hmm.

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772

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
STATE OF IDAHO, COUNTY OF BONNEVILLE

---oOo---

THOMAS O'SHEA and ANNE DONAHUE O'SHEA,  
Trustees of the Thomas and Anne O'Shea Trust  
u/d/t DATED NOVEMBER 2, 1998; GRANDVIEW  
CREDIT, LLC, a California limited liability  
company; CALEB FOOT, an individual, KATE  
LARKIN DONAHUE, an individual, JOHN KEVIN  
DONAHUE, an individual, and SAN FRANCISCO  
RESIDENCE CLUB, INC., a California  
corporation,

Plaintiffs,

vs.

CASE NO.

CV-08-4025

HIGH MARK DEVELOPMENT, LLC, and Idaho limited  
liability company; GORDON ARAVE, individually  
and as Officer of High Mark Development, LLC;  
BENJAMIN D. ARAVE, individually and as  
Officer of High Mark Development,  
Defendants.

DEPOSITION OF MICHAEL SHIFFMAN

July 10, 2009

---oOo---

Ref. No. 23342

Reported by: LAURA AXELSEN, CSR NO. 6173

RMR, CRP, CLR

1 deposition?

2 A. I did that to refresh my memory in order to be  
3 able to testify accurately.

4 Q. Okay. Do they reflect anything other than a  
5 timeline of events?

6 A. They may reflect some thoughts on the case  
7 and --

8 Q. Uh-huh.

9 A. -- some of my basic view of what was going on --

10 Q. Uh-huh.

11 A. -- what I felt was important.

12 Q. I would ask you to preserve those --

13 A. Sure.

14 Q. -- in the event that the issues brought up with  
15 Judge Tingey in the case.

16 A. Absolutely.

17 Q. But just so that we're clear, you're objecting  
18 to letting me look at those documents in this deposition.  
19 correct?

20 A. That's correct.

21 Q. And the basis for your objection is work  
22 product?

23 A. The document that you're referring to is a  
24 one-page handwritten timeline.

25 Q. Okay. There's a set of papers that are paper  
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1 clipped to that. What are those papers?

2 A. They're the same, some of the same documents  
3 that I've produced for.

4 Q. Any that are different?

5 A. No.

6 Q. Okay. So you're referring to one page, is it  
7 one-sided?

8 A. That's correct.

9 Q. And it's your handwriting?

10 A. That is correct.

11 Q. Okay. You testified going back to when you were  
12 first contacted in this case, you were contacted middle of  
13 September, 2007?

14 A. That's correct.

15 Q. Who contacted you?

16 A. Tom O'Shea.

17 Q. Anybody else?

18 A. No.

19 Q. Prior to that contact, did you know Jeff Needs?

20 A. No.

21 Q. So was your relationship or exposure to Jeff  
22 Needs, did that originate with this particular matter?

23 A. That's correct.

24 Q. Were you contacted by Mr. O'Shea to provide  
25 legal advice that first instance?

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1 A. I was contacted to provide legal advice with  
2 regard to this transaction. and certain areas within it.

3 Q. Okay. Are you willing to tell me what that  
4 conversation involved?

5 A. I'm not willing to tell you conversations that I  
6 had with my clients that would otherwise be privileged.  
7 If there were third parties present or on the phone or  
8 there were e-mails or documentation that was shown to  
9 third parties, I would be happy to disclose those.

10 Q. Okay. And I just -- I don't want to intrude on  
11 that privilege. And I appreciate that clarification. At  
12 the time you were first contacted by Mr. O'Shea, was  
13 anyone else present in that discussion?

14 A. No.

15 Q. With regard to this particular transaction, did  
16 you represent anyone other than the O'Sheas?

17 A. Well, it's always a difficult question for a  
18 transactional lawyer, isn't it? My recollection is that  
19 the contract was in Mr. O'Shea's name, and later I found  
20 there were other parties involved, and to the extent that  
21 I provided work and advice, I certainly thought that it  
22 was on behalf of all of the investor parties rather than  
23 just Mr. O'Shea.

24 Q. So when you conducted or performed services in  
25 this case, were you authorized to provide those services

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1 on behalf of all of the buyers of the property?

2 A. I believe that at the point that I discovered  
3 there were other buyers and there was work to be performed  
4 that was of benefit to all of them, that I looked at the  
5 buyer group as the client rather than just Mr. O'Shea.

6 Q. Did you have an engagement letter with the  
7 O'Sheas or any of the other investors in relation to this  
8 transaction?

9 A. No.

10 Q. As a result of your discussions, this initial  
11 discussion with Mr. O'Shea, was there any document that  
12 was generated as a result of that -- of that conversation?

13 A. I believe I received a copy of a purchase and  
14 sale agreement I think with a second addendum to it, which  
15 basically told me that this transaction was well on its  
16 way, and I'm not mistaken I believe there was a couple of  
17 days away from becoming a firm agreement. And I think  
18 Mr. O'Shea's reason for contacting me was to work with an  
19 estoppel that was provided by Mr. Needs to him.

20 Q. Okay. So your first assignment was to work with  
21 an estoppel certificate?

22 A. That's correct.

23 Q. And that would have been the middle of  
24 September, 2007?

25 A. That's correct.

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1 MR. ARMSTRONG: Q. Handing you Exhibit 7 to  
2 your deposition, do you recognize that?

3 A. Yes.

4 Q. What is that?

5 A. It's an e-mail from me to Jeff Needs dated  
6 September 19th.

7 Q. That's the second e-mail, correct?

8 A. That is correct. Which presumably attached --  
9 had language for indemnification for clarity, which I  
10 believe would have been the item C that we talked about  
11 previously. And then it's an e-mail from Mr. Needs to me,  
12 same subject line, attaching Addendum No. 3.

13 Q. And he also states, "Mr. Shiffman, Tom informed  
14 me that you are preparing a tenant estoppel to clarify  
15 some of the expense and insurance items in the lease."  
16 Did I read that correctly?

17 A. That's correct.

18 Q. Okay. Does this document help refresh your  
19 memory as to whether you had already received an estoppel  
20 and reviewed an estoppel?

21 A. Well, whether he's correct or not that I am --  
22 if I'm preparing -- I can't remember whether that was I  
23 was preparing a new estoppel or I was taking an existing  
24 estoppel that had been prepared and making modifications  
25 to it. But I suspect I've given you other documents that

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1 will help refresh my memory on that subject as well.

2 (EXHIBIT 8 WAS MARKED FOR IDENTIFICATION.)

3 MR. ARMSTRONG: Q. Handing you Exhibit 8 to  
4 your deposition, do you recognize that document?

5 A. Yes. This a string of e-mails, the first two of  
6 which we just previously discussed, and then an e-mail  
7 from me to Mr. Needs asking on September 21st at  
8 7:25 p.m.. "Could you send me the prior estoppel as a Word  
9 document, please."

10 Obviously I wanted to work from the estoppel and  
11 make -- add changes so it could show as a red line and  
12 everybody could see it, and Mr. Needs, a day later,  
13 responded that the estoppel was created by seller. So I  
14 do not have a Word doc attached as a JPEG of it, which, as  
15 you know, doesn't allow you to make changes or mark it up.

16 Q. So what did you do after you received this  
17 e-mail?

18 A. I presumably did something to try to change the  
19 estoppel.

20 (EXHIBIT 9 WAS MARKED FOR IDENTIFICATION.)

21 MR. ARMSTRONG: Q. Handing you what's been  
22 marked as Exhibit 9 to your deposition. This is a -- do  
23 you recognize this document?

24 A. No. I'm not sure that I do. Let me refresh my  
25 memory by looking at another document that I produced for

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1 you. What you're showing me as Exhibit 9 may have been  
2 the JPEG lease estoppel that was referred to in the last  
3 e-mail we discussed.

4 Q. Which you would have then taken and re-worked?

5 A. Could not have re-worked because it was a JPEG.

6 Q. Okay. So what did you do? Did you draft a new  
7 document? Do you recall what you did after you received  
8 the document marked as Exhibit 9?

9 A. Refreshing my memory by looking at another  
10 e-mail that I've produced for you, yet unmarked, on  
11 Saturday, September 22nd at 9:31 p.m. I have an e-mail  
12 sent to Mr. Needs and Mr. O'Shea, Kate Donahue, and Kevin  
13 Donahue with a copy to my legal assistant entitled New  
14 Estoppel.

15 "Please review for content. The old estoppel  
16 has this address, but the title report had 1619 Curlew,  
17 which is correct. I do not have the name of the lessor as  
18 the lease is in the office." So I'm obviously working  
19 from home. "Please add this and fill in blanks. Anyone  
20 good at formatting? I want to add an additional signature  
21 line for one more corporate officer or tenant, two is  
22 better than one, and I want to add notary block as  
23 well. Delete the footers. My executive assistant will do  
24 this in the a.m. Monday if no one else can, but let's add  
25 in what we can now. Thanks."

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1 So I was working from home drafting --  
2 presumably drafted a new estoppel document.

3 MR. ARMSTRONG: Okay. Let's go ahead and mark  
4 that e-mail.

5 (EXHIBIT 10 WAS MARKED FOR IDENTIFICATION.)

6 MR. ARMSTRONG: Q. Handing you what's been  
7 marked as Exhibit 10 to your deposition, Mr. Shiffman.

8 A. Yes.

9 Q. You were looking at Exhibit 9. Was there  
10 anything you wanted to add to your testimony after looking  
11 at Exhibit 9?

12 A. No, I was just trying to familiarize myself with  
13 the early release estoppel certificate that you handed me,  
14 being Exhibit 9.

15 Q. And you're now looking at Exhibit 10. Is that  
16 the same e-mail you were referring to earlier?

17 A. That's correct. This is the e-mail I just read  
18 to you.

19 Q. And this e-mail is re-working the old estoppel  
20 certificate?

21 A. That's correct.

22 Q. Or indicating what you will be doing vis-a-vis  
23 the old estoppel certificate?

24 A. I believe there was an attachment estoppel  
25 draft.

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1 question, "Did you not like my additional language for the  
2 indemnification?" that was because you had seen a document  
3 that was signed that didn't include your additional  
4 language?

5 A. Yeah, that's because he had said "I've attached  
6 an Addendum No. 3," which I think had indemnification  
7 language different than mine.

8 (EXHIBIT 17 WAS MARKED FOR IDENTIFICATION.)

9 MR. ARMSTRONG: Q. Handing you Exhibit 17 to  
10 your deposition, is that a continuation -- or is the  
11 e-mail at the top of Exhibit 17, a response to your  
12 question, "Did you not like my additional language?"

13 A. Yes.

14 Q. And what is Jeff Needs telling you there?

15 A. "Mike, sorry I did not have your language by the  
16 time we sent out Addendum No. 2 for seller to sign. Since  
17 the seller has signed it and the language already covers  
18 any and all costs, by going back now with another language  
19 change in the additional estoppel would be tough."

20 Q. Okay. So did your language eventually find its  
21 way into an addendum?

22 A. I don't believe so.

23 Q. Okay.

24 A. It ends up being unimportant because I think the  
25 whole indemnification issue got removed.

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1 Q. Do you know how it got removed?

2 A. I believe the reason for the indemnification  
3 language had to do with the potential option to purchase  
4 that the tenant had in its lease, and you were able to  
5 negotiate that language out -- or I shouldn't say you. I  
6 should say your client was able to negotiate that language  
7 out of the lease by way of a new lease addendum to reflect  
8 that, which is partially the subject of this litigation.

9 (EXHIBIT 18 WAS MARKED FOR IDENTIFICATION.)

10 MR. ARMSTRONG: Q. Handing you Exhibit 18 to  
11 your deposition. This was another document that you  
12 produced to us pursuant to your subpoena. Do you  
13 recognize that document?

14 A. Yes.

15 Q. What is that?

16 A. It's an amendment to a lease agreement, which  
17 modified the original lease to remove the option to  
18 purchase the lease premises.

19 Q. This is signed October 23rd, 2007. It states in  
20 the first sentence, "in exchange, for valuable  
21 consideration for receipt and sufficiency of which is  
22 hereby acknowledged, the parties to the lease agreement  
23 dated June 19, 2006, hereby agree to amend the lease  
24 agreement as follows."

25 Did you ever, yourself, inquire of your client

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1 or of Mr. Needs, rather -- I don't want to intrude on any  
2 attorney-client privilege -- but did you ever inquire of  
3 Mr. Needs as to what in prior to closing what the  
4 consideration was for this amendment?

5 A. No.

6 Q. Is there a reason why?

7 A. Well, in the first place, the language in  
8 exchange for valuable consideration receipt and blah,  
9 blah, blah is very standard kind of law school contract  
10 drafting consideration language, which doesn't necessarily  
11 mean there was any real consideration given other than the  
12 parties agreed they were going to make this change.

13 Secondly, this -- I'm not quite sure when I saw  
14 this, but it just seemed to resolve what was in issue that  
15 was potentially a problem, although I thought resolved by  
16 the indemnification, and, you know, wasn't a legal issue  
17 to delve into, frankly.

18 Q. Well, if it wasn't supported by consideration,  
19 it wouldn't be enforceable, would it?

20 A. Well, it depends what jurisdiction you're in.  
21 Writing is deemed adequate consideration in many  
22 jurisdictions.

23 Q. You don't know what the answer to that question  
24 is under Idaho law?

25 A. No, I don't.

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1 Q. But generally, as a matter of course, common law  
2 contracts you've got to have consideration, something of  
3 value being exchanged in order to have an enforceable  
4 contract?

5 A. Well, I don't think I'm here today to opine on  
6 the law with you. A peppercorn will do.

7 (EXHIBIT 19 WAS MARKED FOR IDENTIFICATION.)

8 MR. ARMSTRONG: Q. I've handed you what's been  
9 marked as Exhibit 19 to your deposition. Do you recognize  
10 that document?

11 A. Isn't this the same document we previously  
12 marked?

13 Q. Well, let's find out.

14 A. No, that's not it. Three seems familiar. I  
15 just want to go through the documents that we previously  
16 had. So this Exhibit 19 is another document that I  
17 provided to you this morning.

18 Q. Okay. So you do recognize that as being a  
19 document you produced pursuant to the subpoena?

20 A. That is correct.

21 Q. Did you draft Addendum No. 3? I'm sorry. More  
22 specifically, did you draft Exhibit 19?

23 A. No, I did not.

24 Q. That was previously marked. Handing you  
25 Exhibit 7. Is that the same document that refers to

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- 1 A. Crime -- crime in California.  
 2 **Q. Did you take notes?**  
 3 A. I did take some notes.  
 4 **Q. Do you know if your clients took notes?**  
 5 A. I'm not sure.  
 6 **Q. Do you still have those notes?**  
 7 A. I believe I had looked at those notes not too  
 8 long ago to refresh my memory and couldn't find them when  
 9 I looked again. Recent.  
 10 **Q. Couldn't find them?**  
 11 A. Yeah, it doesn't mean they're -- I'm not -- my  
 12 office is pretty messy.  
 13 **Q. Join the crowd. And it was in that conversation**  
 14 **that you feel you had learned or you came to the**  
 15 **conclusion that counsel for Mr. Arave for High Mark**  
 16 **Development had drafted the estoppel certificates?**  
 17 A. Whether it was drafted the estoppel  
 18 certificates, whether I think it was more in the area of  
 19 the dropping of the -- re-drafting the lease to drop the  
 20 option agreement and negotiated the dropping of the  
 21 promissory notes as consideration for that. And with all  
 22 due respect, having knowledge that they didn't pay rent  
 23 for October and November and taking no action to inform  
 24 the buyers that it was a problem with a tenant and did we  
 25 want to re-look at what we were doing.

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- 1 Frankly, you can say thank you to Greg Crocket  
 2 for not being a party to this lawsuit.  
 3 **Q. Why do you say that?**  
 4 A. Because from everything that I looked at I  
 5 thought you had acted improperly and that you should have  
 6 required your client to disclose what was going on or to  
 7 have removed yourself from your representation based upon  
 8 what I believed to be the facts.  
 9 **Q. Okay. What leads you to -- what leads you to**  
 10 **say that?**  
 11 A. I've already explained that to you.  
 12 **Q. And the facts being the documents that were**  
 13 **drafted or the agreement that was drafted releasing the**  
 14 **option?**  
 15 A. And the knowledge of non-payment of rent, the  
 16 knowledge that we'll call the promissory notes rent. I  
 17 think the promissory notes are the lender and try to pay  
 18 the mortgage with it, I don't think that works.  
 19 **Q. Anything --**  
 20 A. But it's neither here nor there. You're off the  
 21 hook.  
 22 **Q. Anything else?**  
 23 A. Not that I can think of at the moment.  
 24 **Q. Your e-mail that's marked as Exhibit 30 where**  
 25 **you indicate that the -- where you bet that Arave's**

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- 1 **attorney had drafted the estoppel certificate, you had**  
 2 **actually drafted portions of the estoppel certificates,**  
 3 **correct?**  
 4 A. I had not drafted the final certificate that was  
 5 signed.  
 6 **Q. Portions, though, of that final estoppel**  
 7 **certificate were drafted by you, correct?**  
 8 A. Portions were drafted by a lot of different  
 9 people.  
 10 **Q. Okay. So is that really a claim in this case**  
 11 **that the seller was responsible for what was stated in the**  
 12 **estoppel certificate?**  
 13 A. I think the seller is responsible for the  
 14 statement that rent is paid, the tenant is current,  
 15 there's no default under the lease, yes.  
 16 **Q. Did you ever meet with the tenant in this case,**  
 17 **prior to the closing?**  
 18 A. No.  
 19 **Q. Did you ever talk to them?**  
 20 A. No.  
 21 **Q. Do you recall a phone conversation with me where**  
 22 **you had called me?**  
 23 A. No.  
 24 **Q. You don't remember ever calling me prior to this**  
 25 **lawsuit being filed?**

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- 1 A. Refresh my memory.  
 2 **Q. Do you remember calling me and asking me**  
 3 **questions about the tenant's financial condition in its**  
 4 **tax returns?**  
 5 A. No.  
 6 **Q. You don't remember having a phone call with me?**  
 7 A. Was this prior to closing?  
 8 **Q. After closing, prior to the filing of the**  
 9 **lawsuit.**  
 10 A. I may have, I don't recall.  
 11 **Q. Okay. You didn't record that conversation?**  
 12 A. Illegal.  
 13 **Q. Okay.**  
 14 A. Did you?  
 15 **Q. No.**  
 16 A. Did we have a conversation?  
 17 **Q. We did. You don't recall making statements**  
 18 **about what your client thought about the tenant's**  
 19 **financial condition prior to closing based on what the**  
 20 **information that they had gleaned from tax returns?**  
 21 A. Not that I recall.  
 22 **Q. Okay.**  
 23 A. I know my client believed, based upon what tax  
 24 returns they had, the tenant was financially able to pay  
 25 the rent, had substantial gross revenues, and had paid

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## The Children's Center Inc

Jeff Needs · (208) 468-7730 · [jeff@needsrealestate.com](mailto:jeff@needsrealestate.com)

## Needs Real Estate Services

Prepared For: O'Shea Family Trust



### 1675 Curlew Idaho Falls, ID

County:	Bonneville
Property Type:	Office Medical Office
Building Size:	20,000 SF
Building Class:	A
Lot Size:	50,403 SF
Occupancy:	100%
Price:	\$3,800,000
Price/SF	\$190.00
Cap Rate:	8.00%
Status:	Active
LoopNet ID:	15166694

<http://listing.loopnet.com/15166694>

- New Building
- Single Tenant

- 10 year lease with option to renew
- Triple Net Lease

#### Property Description

Here is a great investment property with that hard to find 10 year, Triple Net Lease. New building, lease matures in 2016, option to renew with CPI increases. Tenant is The Children's Center Inc. who specializes in complete children care.

#### Location Description

East on 17 Street to Curlew, on the corner of East 17th and Curlew


EXHIBIT

A

Created: 8/7/2007

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Support by  LoopNet

Jeff Needs · (208) 468-7730 · [jeff@needsrealestate.com](mailto:jeff@needsrealestate.com)

Prepared For: O'Shea Family Trust

Major Tenant Information		
Tenant Name	Lease End Date	SF Occupied
The Children's Center Inc.	6/19/2016	20,000

**Contact**  
Paul Fife High Desert Realtors (208) 317-6111

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RE-23 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 1 OF 7



RE-23 COMMERCIAL/INVESTMENT REAL ESTATE  
PURCHASE AND SALE AGREEMENT

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.



ID# 1992

DATE August 9, 2007

LISTING AGENCY High Desert Realtors Office Phone #208-535-0350 Fax #  
Listing Agent Paul Fife E-Mail pfife@highdesertrealtors.com Phone #  
SELLING AGENCY Needs Real Estate Office Phone #208-409-8565 Fax #  
Selling Agent Jeff Needs E-Mail needs@realestate.com Phone #

1. BUYER: O'Shea Family Trust and or assigns (Hereinafter called "BUYER")  
agrees to purchase, and the undersigned SELLER agrees to sell the following described real estate hereinafter referred to as "PREMISES":  
COMMONLY KNOWN AS 1675 Curlew City Armon  
County, Bonneville ID, Zip 83404 and legally described as: Real. 50,403.89 sq. ft. Lot 1, Block 1, Oak  
Ridge Division, City of Armon  
OR Legal Description Attached as addendum # (Addendum must accompany original offer.)

2.5 3,700,000.00 PURCHASE PRICE: Three million seven hundred thousand DOLLARS,  
payable upon the following TERMS AND CONDITIONS (not including closing costs):

3. FINANCIAL TERMS: Note: A+C+D must equal the total purchase price.

\$ 50,000.00 (A). EARNEST MONEY: BUYER hereby deposits Fifty thousand DOLLARS as Earnest  
Money evidenced by: ☐ cash ☐ personal check ☐ cashier's check ☐ note (due date):  
☒ other wire transfer Earnest Money to be deposited in trust account ☐ upon receipt, or ☒ upon acceptance by all parties  
and shall be held by: ☐ Listing Broker ☐ Selling Broker ☒ other: Paul Fife, Broker for the benefit of the parties hereto. The  
responsible Broker shall be Doug Page

(B). ALL CASH OFFER ☐ NO ☒ YES IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE  
SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER within business days from the date of acceptance of  
this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes,  
but is not limited to a copy of a recent bank or financial statement or contract(s) for the sale of BUYER'S current residence or other property to be  
sold.

(C). FINANCING:

- ☐ Additional financial terms are specified under the heading "OTHER TERMS AND CONDITIONS" (Section 5 below)  
☐ Additional financing terms are contained in a financing addendum of same date, and attached hereto, and signed by both parties.

\$ 3,650,000.00 (D). APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING: (Not including closing costs) Cash at closing in  
be paid by BUYER at closing in GOOD FUNDS, includes cash, electronic transfer funds, certified check, or cashier's check.

4. SECTION 1031 TAX DEFERRED EXCHANGE: By checking either or both of the boxes that follow, it is hereby acknowledged by the parties  
that the ☒ Buyer, ☐ Seller intends to use the purchase and sale of the Premises as an integral part of a tax deferred like-kind exchange as  
allowed under Section 1031 of the Internal Revenue Code (the "Exchange"). For purposes of this paragraph, the party participating in the  
Exchange shall be identified as the "Exchanger." If either box above is checked, then the parties recognize that a material part of the  
Exchanger's consideration for entering into the agreement for the purchase and sale of the Premises is the successful completion of the  
exchange. The parties agree to assist each other in the completion of such exchange by cooperating with each other by signing any and all  
relevant documents provided that the party not doing the Exchange shall not incur any liabilities, costs, fees, or taxes in excess of those which  
that party would have incurred had this transaction not been an Exchange.

BUYER'S Initials: *JS* X Date: *Aug 14, 2007*

SELLER'S Initials: *JCF* Date: *8/14/07*

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RE-23 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 1 OF 7

Exhibit No. 52  
Date: 5/12/09  
O'Shea  
T&T REPORTING

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RE-21 PURCHASE & SALES AGREEMENT FOR COMMERCIAL REAL ESTATE, JULY, 2007 EDITION PAGE 2 OF 7

PROPERTY ADDRESS: 1675 Curlew

Arave

ID# L892

5. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations and/or contingencies which must be satisfied prior to closing see Addendum #1

6. INCLUDED ITEMS:

(a) All existing fixtures and fittings that are attached to the premises are included in the purchase price (unless excluded below) and shall be transferred free of liens. These include but are not limited to, all attached floor coverings, attached television antennae, satellite dish and receiving equipment, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm windows, storm doors, all window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks, all water systems, wells, spring water that are now on or used in connection with the premises shall be included in the sale unless otherwise provided herein.

(b) Irrigation fixtures and equipment, and any and all, if any, water and water rights, and any and all, if any, ditches and ditch rights that are appurtenant thereto that are now on or used in connection with the premises shall be included in the sale unless otherwise provided herein.

(c) Other items specifically included in this sale: none

(d) Items specifically excluded in this sale: Tenants personal property

7. TITLE CONVEYANCE: Title of SELLER is to be conveyed by ☒ warranty deed ☐ special warranty deed or ☐ deed, and is to be marketable and insurable except for rights reserved in federal patents, state or railroad deeds, building or use restrictions, building and zoning regulations and ordinances of any governmental unit, and rights of way and easements established or of record. Liens, encumbrances or defects to be discharged by SELLER may be paid out of purchase money at date of closing. No liens, encumbrances or defects which are to be discharged or assumed by BUYER or to which title is taken subject to, exist unless otherwise specified in this Agreement.

8. TITLE INSURANCE: There may be types of title insurance coverages available other than those listed below and parties to this agreement are advised to talk to a title company about any other coverages available that will give the buyer additional coverage.

(A). PRELIMINARY TITLE COMMITMENT: Prior to closing the transaction ☒ SELLER or ☐ BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said premises. BUYER shall have 5 business day(s) from receipt of the preliminary commitment or not fewer than twenty-four (24) hours prior to closing, within which to object in writing to the condition of the title as set forth in the preliminary commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title. It is agreed that if the title of said premises is not marketable, or cannot be made so within 5 business day(s) after notice containing a written statement of defect is delivered to SELLER, BUYER'S Earnest Money deposit will be returned to BUYER and SELLER shall pay for the cost of the title insurance cancellation fee, escrow and legal fees, if any.

(B). TITLE COMPANY: The parties agree that Pioneer Title Company located at Boise shall provide the title policy and preliminary report of commitment.

BUYER'S Initials AB X Date Aug 14, 2007

SELLER'S Initials RA X Date 8/14/07

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RE-21 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 2 OF 7

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## RE-23 PURCHASE &amp; SALE AGREEMENT FOR COMMERCIAL REAL ESTATE, JULY, 2007 EDITION PAGE 2 OF 7

PROPERTY ADDRESS: 1675 Curlew

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(C). STANDARD COVERAGE OWNERS' POLICY: SELLER shall within a reasonable time after closing furnish to BUYER a title insurance policy in the amount of the purchase price of the premises showing marketable and insurable title subject to the liens, encumbrances and defects elsewhere set out in this Agreement to be discharged or assumed by BUYER unless otherwise provided herein. The risk assumed by the title company in the standard coverage policy is limited to matters of public record. BUYER shall receive a ILLINOIS Owners' Policy of Title Insurance. A title company, at BUYER's request, can provide information about the availability, desirability, coverage and cost of various title insurance coverages and endorsements. If BUYER desires title coverage other than that required by this paragraph, BUYER shall instruct closing agency in writing and pay any increase in cost unless otherwise provided herein.

(D). EXTENDED COVERAGE LENDER'S POLICY (Mortgagee policy): The lender may require that BUYER (Borrower) furnish an Extended Coverage Lender's Policy. This extended coverage lender's policy considers matters of public record and additionally insures against certain matters not shown in the public record. This extended coverage lender's policy is solely for the benefit of the lender and only protects the lender.

## 9. INSPECTION/DUE DILIGENCE:

(A). BUYER shall have the right to conduct due diligence inspections, investigations, tests, surveys and other studies at BUYER'S expense unless otherwise indicated below or agreed upon in writing by the parties. BUYER chooses ☒ to have inspection ☐ not to have inspection. If BUYER chooses not to have inspection skip the remainder of this section 9. BUYER shall, within 20 business day(s) of acceptance, complete these inspections and give to SELLER written notice of disapproved items. BUYER is strongly advised to exercise these rights and to make BUYER's own selection of professionals with appropriate qualifications to conduct inspections of the entire premises. The closing of this transaction is conditioned upon BUYER's satisfaction or waiver of the following contingencies.

INSPECTION ITEM; COSTS PAID BY	BUYER	SELLER	SHARED EQUALLY	N/A	INSPECTION ITEM; COSTS PAID BY	BUYER	SELLER	SHARED EQUALLY	N/A
Environmental Inspection (Phase I)				<input checked="" type="checkbox"/>	Hazardous Waste report(s)				<input checked="" type="checkbox"/>
Environmental Inspection (Phase II)				<input checked="" type="checkbox"/>	Other environmental hazards to human health (e.g., mold, radon, asbestos, etc.)				<input checked="" type="checkbox"/>
Environmental Inspection (Phase III)				<input checked="" type="checkbox"/>	Review of seller's relevant business documents				<input checked="" type="checkbox"/>
Survey				<input checked="" type="checkbox"/>	Utility and Zoning Studies				<input checked="" type="checkbox"/>
Water Rights				<input checked="" type="checkbox"/>	Post, dry rot & structural Inspection(s)				<input checked="" type="checkbox"/>
Flood Zone Hazard				<input checked="" type="checkbox"/>	Compliance with American With Disabilities Act				<input checked="" type="checkbox"/>
Soils and Percolation Test(s)				<input checked="" type="checkbox"/>	Well/Septic				<input checked="" type="checkbox"/>
Survey				<input checked="" type="checkbox"/>					

☒ The following documents and materials shall be provided by the SELLER to the BUYER as part of the BUYER'S inspection/due diligence: Income and expense statements for the 2006, Year-to-date 2007, through July, income and expense statement, aged receivables report, copies of any appraisal or phase 1 reports, list of all warranties on the building and copy of the lease, 2005 and 2006 federal tax returns of tenant and a current balance sheet showing assets and liabilities.

## (B). SATISFACTION/REMOVAL OF INSPECTION DUE DILIGENCE CONTINGENCIES:

1). If BUYER does not within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall conclusively be deemed to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

2). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall provide to SELLER pertinent section(s) of written inspection reports. SELLER shall have 3 business day(s) in which to respond in writing. The SELLER, at their option, may correct the items as specified by the BUYERS in their letter or may elect not to do so. If the SELLER agrees to correct the items asked for in the BUYERS letter, then both parties agree that they will continue with the transaction and proceed to closing. This will remove the BUYER'S inspection contingency.

BUYER'S Initials ( SP ) Date Aug-14, 2007SELLER'S Initials ( HC ) Date 8/14/07

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RE-23 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 3 OF 7

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## RE-23 PURCHASE &amp; SALE AGREEMENT FOR COMMERCIAL REAL ESTATE, JULY, 2007 EDITION PAGE 4 OF 7

PROPERTY ADDRESS: 1675 Curlew

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3). If SELLER elects not to correct the disapproved items, or does not respond in writing within the strict time period specified, then the BUYER(S) have the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within \_\_\_\_\_ business days that they will not continue with the transaction and demand the return of their Earnest Money.

4). If BUYER does not give such written notice of cancellation within the strict time periods specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without repairs or corrections other than for items with SELLER has otherwise agreed in writing to repair or correct. SELLER shall make the premises available for all inspections. BUYER shall keep the premises free and clear of liens, indemnify and hold SELLER harmless from all liability, claims, demands, damages and costs, and repair any damages arising from the inspections. No inspections may be made by any governmental building or zoning inspector or government employee without the prior consent of SELLER unless required by local law.

10. ADDITIONAL COSTS: Costs in addition to those listed below may be incurred by BUYER and SELLER unless otherwise agreed herein, or provided by law or required by lender, or otherwise stated herein. The below costs will be paid as indicated. Some costs are subject to loan program requirements. SELLER agrees to pay up to \$ \_\_\_\_\_ of lender required repair costs only. BUYER or SELLER has the option to pay any lender required repair costs in excess of this amount.

COSTS	BUYER	SELLER	SHARED EQUALLY	N/A	COSTS	BUYER	SELLER	SHARED EQUALLY	N/A
Amortized fee					Flood certification/tracking fee				
Long term Escrow fees					Title Ins. Standard Coverage buyers policy				
Closing fee					Lenders Extended Policy				
Additional Title Ins.					Attorney contract preparation and/or review fee				
Water Rights									

11. ESCROW/COLLECTION: If a long-term escrow/collection is involved, then the escrow/collection holder shall be \_\_\_\_\_. Each party agrees to pay one-half of escrow/collection fees and escrow setup fees.

12. RESIDENTIAL PROPERTY CONDITION DISCLOSURE: Idaho Code §55-2501 et seq. requires that any person intending to transfer "residential real property" deliver to the transferee or his agent, within ten (10) days of the acceptance of an offer to purchase, a SELLER PROPERTY DISCLOSURE FORM. "Residential real property" means real property that is improved by a building or other structure that has one (1) to four (4) dwelling units or an individually owned unit in a structure of any size. This also applies to real property which has a combined residential and commercial use. The property ☒ is ☐ is not subject to the Property Condition Disclosure Act.

13. LEAD-BASED PAINT DISCLOSURE: Properties that meet the criteria of "target housing" require certain disclosures regarding lead-based paint hazards. The term lead-based paint hazard is intended to identify lead-based paint and all residential lead-containing dusts and soils regardless of the source of the lead. Pursuant to 42 USCA §4851 et seq., "target housing" means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than six (6) years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any zero-bedroom dwelling. A "residential dwelling" means a single-family dwelling, including attached structures such as porches and stoops; or a single-family dwelling unit in a structure that contains more than one (1) separate residential dwelling unit and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one (1) or more persons. "Residential real property" means real property on which there is situated one (1) or more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one (1) or more persons.

The subject property ☐ is ☒ is not defined as "Target Housing" regarding lead-based paint or lead-based paint hazards. If yes, BUYER hereby acknowledges the following: (a) BUYER has been provided an EPA approved lead-based paint hazard information pamphlet, "Protect Your Family From Lead In Your Home," (b) receipt of the Seller's Disclosure of Information and Acknowledgment Form and have been provided with all records, test reports or other information, if any, related to the presence of lead-based paint hazards on said property, (c) that this contract is contingent upon BUYER'S right to have the property tested for lead-based paint hazards to be completed no later than \_\_\_\_\_ or the contingency will terminate, (d) that BUYER hereby ☐ waives ☒ does not waive this right, (e) that if test results show unacceptable amounts of lead-based paint on the property, BUYER has the right to cancel the contract subject to the option of the SELLER (to be given in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before closing, (f) that if the contract is cancelled under this clause, BUYER'S earnest money deposit will be returned to BUYER.

BUYER'S Initials RS X ) Date Aug 14, 2007SELLER'S Initials RA ) Date 8/14/07

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RE-23 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 4 OF 7



RE-23 PURCHASE &amp; SALE AGREEMENT FOR COMMERCIAL REAL ESTATE, JULY, 2007 EDITION PAGE 5 OF 7

PROPERTY ADDRESS: 1675 Curlew \_\_\_\_\_ Auction \_\_\_\_\_ 1992 \_\_\_\_\_

14. SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.

15. COVENANTS, CONDITIONS AND RESTRICTIONS (CC&Rs): BUYER is responsible to obtain and review a copy of the CC&Rs (if applicable). BUYER has reviewed CC&Rs ☐ Yes ☒ No.

16. RISK OF LOSS: Prior to the closing of this sale, all risk of loss shall remain with SELLER. In addition, should the premises be materially damaged by fire or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.

17. CONDITION OF PREMISES AT CLOSING: Upon expiration of the Inspection/Due Diligence period and thereafter, BUYER agrees to purchase the Premises in as-is condition, where is, with all faults and with no further repairs required unless otherwise agreed upon by the parties in writing. BUYER will assume all obligations with respect to the Premises. SELLER shall maintain the Premises until the closing in its present condition, ordinary wear and tear excepted.

18. CLOSING AGENCY: The Closing Agency for this transaction shall be Pioneer Title located at Boise, ID \_\_\_\_\_

19. CLOSING DATE: On or before the closing date, BUYER and SELLER shall deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than September 15, 2007. "Closing Date" means the date on which all documents are either recorded or accepted by an escrow/collection agency and the sale proceeds are available to SELLER.

20. POSSESSION/PURATION: BUYER shall be entitled to possession ☒ UPON CLOSING or ☐ DATE TIME \_\_\_\_\_ AM ☐ PM. Taxes and water assessments (using the last available assessment as a basis), rents, insurance premiums, interest and reserve on liens, encumbrances or obligations assumed and utilities shall be prorated as of the day of closing or date of closing. Any tenant deposits held by SELLER shall be credited to BUYER at closing.

21. "NOT APPLICABLE DEFINED:" The letters "n/a," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.

22. FACSIMILE TRANSMISSION: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either party or the Closing Agency, the parties will confirm facsimile and electronic transmitted signatures by signing an original document.

23. BUSINESS DAYS & HOURS A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real property is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.

24. DEFAULT: IF BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER's Broker, provided that the amount to be paid to SELLER's Broker shall not exceed the Broker's agreed to commission. SELLER and BUYER specifically acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER's sole and exclusive remedy, and such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fee, title insurance, escrow fees, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the matter. IF SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Earnest Money deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, credit report fees, inspection fees, Brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.

BUYER'S Initials SA X Date Aug 16, 2007SELLER'S Initials R.A. X Date 8/16/07

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RE-23 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 5 OF 7

## RE-23 PURCHASE &amp; SALES AGREEMENT FOR COMMERCIAL REAL ESTATE, JULY, 2007 EDITION PAGE 6 OF 7

PROPERTY ADDRESS: 1675 Cuxlev

Name

ID# 1992

25. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

26. EARNEST MONEY DISPUTE / INTERPLEADER: Notwithstanding any termination of this contract, BUYER and SELLER agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any moneys or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.

27. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

28. COUNTERPARTS: This Agreement may be executed in counterparts. Executing an agreement in counterparts shall mean the signature of two identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies shall together constitute one and the same instrument.

29. SALES PRICE INFORMATION: SELLER and BUYER hereby grant permission to the brokers and either party to this Agreement to disclose sales data from this transaction, including selling price and property address to the local Association/Board of REALTORS®, multiple listing service, its members, its members' prospects, appraisers and other professional users of real estate sales data. The parties to this Agreement acknowledge that sales price information compiled as a result of this Agreement may be provided to the County Assessor's Office by either party or by either party's broker.

30. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).

## Section 1:

- ☒ A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).  
☐ B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.  
☐ C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).  
☐ D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

## Section 2:

- ☒ A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).  
☐ B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.  
☐ C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).  
☐ D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).

Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.

31. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.

32. ENTIRE AGREEMENT: This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the parties and no warranties, including any warranty of habitability or representations have been made or shall be binding upon either party unless herein set forth.

33. TIME IS OF THE ESSENCE IN THIS AGREEMENT.

BUYER'S Initials ( RA ) Date 8/14/07SELLER'S Initials ( [Signature] ) Date 8/14/07

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RE-23 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 6 OF 7

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## RE-21 PURCHASE &amp; SALES AGREEMENT FOR COMMERCIAL REAL ESTATE, JULY, 2007 EDITION PAGE 7 OF 7

PROPERTY ADDRESS: 1575 Custer

Ammon

ID# 1992

34. ACCEPTANCE: BUYER'S offer is made subject to the acceptance of SELLER on or before (Date) August 13, 2007 at (Local Time) 6:00 ☐ A.M. ☒ P.M. If SELLER does not accept this Agreement within the time specified, the entire Earnest Money shall be refunded to BUYER on demand.

## 35. BUYER'S SIGNATURES:

☒ SEE ATTACHED BUYER'S ADDENDUM(S): 1 (Specify number of BUYER addendum(s) attached.)

BUYER Signature Thomas G. Armstrong

BUYER (Print Name)

Date Aug 14, 07 Time 11:30 ☐ A.M. ☒ P.M.Phone # 510-848-0273 Cell # 510-502-0272Address 1390 Grandview Dr.

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

E-Mail Address Berkley, Ca 94705Fax # 510-848-0273blasket@pacbell.net

BUYER Signature \_\_\_\_\_

BUYER (Print Name) \_\_\_\_\_

Date \_\_\_\_\_ Time \_\_\_\_\_ ☐ A.M. ☐ P.M.

Phone # \_\_\_\_\_ Cell # \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

E-Mail Address \_\_\_\_\_

Fax # \_\_\_\_\_

36. SELLER'S SIGNATURES: On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof on the part of the SELLER.

☐ SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER

☐ SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) # \_\_\_\_\_

SELLER Signature Gordon AraveSELLER (Print Name) Gordon AraveDate 8/14/07 Time 2:15 ☐ A.M. ☒ P.M.Phone # 208-785-3494 Cell # 208-785-2913Address 1395 NW MAINCity BLAINE State ID Zip 83221

E-Mail Address \_\_\_\_\_

Fax # 208-785-3496

SELLER Signature \_\_\_\_\_

SELLER (Print Name) \_\_\_\_\_

Date \_\_\_\_\_ Time \_\_\_\_\_ ☐ A.M. ☐ P.M.

Phone # \_\_\_\_\_ Cell # \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

E-Mail Address \_\_\_\_\_

Fax # \_\_\_\_\_

CONTRACTOR REGISTRATION # (if applicable) \_\_\_\_\_

BUYER'S Initials LA X \_\_\_\_\_ Date Aug 14, 2007SELLER'S Initials MA X \_\_\_\_\_ Date 8/14/07

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RE-21 COMMERCIAL PURCHASE AND SALE AGREEMENT JULY, 2007 EDITION PAGE 7 OF 7

Company: High Desert Realtors

S/N: PC95-06353

Provided by: Paul Fife

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RE-11 ADDENDUM JULY, 2007 EDITION PAGE 1 OF 1



RE-11 ADDENDUM # 1

(1,2,3, etc.)



Date: August 9, 2007

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

This is an ADDENDUM to the ☒ Purchase and Sale Agreement ☐ Other \_\_\_\_\_  
 ("Addendum" means that the information below is added material for the agreement (such as facts or descriptions) and/or means the form is being used to change, correct or revise the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: August 8, 2007 ID #1992

ADDRESS: 1675 Curlew

BUYER(S): O'Shea Family Trust and or Assigns

SELLER(S): High Mark Development LLC

The undersigned parties hereby agree as follows:

Seller to provide following: Indemnification to Buyer from losses, including reasonable attorney/appraisal fees, that Buyer may incur by having to sell the property to Tenant, should Tenant wish to purchase the Property as provided for in the lease.

Estoppels: Seller shall deliver to Buyer and estoppel for the Tenant 10 days prior to Closing.

Should the information provided on the estoppel differ from the information provided by Seller, Buyer shall have the option to terminate the Agreement and receive full refund of Earnest Money. The form of Estoppel shall be attached to the Agreement.

As-Built and Construction Drawings: Five (5) days prior to closing, Seller to deliver to Buyer copies of all as-built and construction drawings for base building and tenant improvement construction.

Other Documents: Seller to utilize best efforts to deliver all property financial, operation, lease and construction documents to Buyer within thirty (30) days after closing, where feasible, Seller shall provide electronic copies of these materials as well.

Buyer to approve warrant deed during inspection period.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: Thomas O'SheaDate: 8/14/2007

BUYER: \_\_\_\_\_

Date: \_\_\_\_\_

SELLER: Arave ConstDate: 8/14/07

SELLER: \_\_\_\_\_

Date: \_\_\_\_\_

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RE-11 ADDENDUM JULY, 2007 EDITION

PAGE 1 OF 1

Company: High Desert Realtors  
 Provided by: Paul Eife

S/N: PCE5-06353

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Addendum #2  
To Purchase and Sale Agreement Dated August 14, 2007  
(the "Agreement")

- 1) **Indemnification of Buyer** – The following replaces lines 11, 12 and 13 of Addendum 1 to the Agreement.
  - a. Seller and Gordon Arave, their assigns, successors and heirs ("Indemnifying Party") hereby indemnifies, defends, and holds harmless Buyer and its successors and assigns, (collectively for the purpose of this section herein, "Indemnified Party") from and against any and all liability, loss, damage, cost and expense, including, without limitation, reasonable attorneys' fees, mortgage penalties and appraisal fees arising out of The Children's Center Inc.'s ("Leasee") attempt to exercise or enforce a purported option to purchase the Premises under a Lease Agreement dated June 26, 2006. Indemnifying Party's duty under this paragraph shall be triggered only upon Indemnified Party's receipt of a written offer to purchase the Premises from the Lessee after June 19, 2009 for a total purchase price of less than \$3,700,000 (the "Triggering Event").
  - b. Upon the occurrence of the Triggering Event, the Indemnified Party shall promptly notify the Indemnifying Party of any attempt to exercise the purported option to which the foregoing indemnification applies and the Indemnifying Party shall undertake, at its own cost and expense, the defense thereof. The Indemnified Party may, at its option and expense, retain own counsel, provided that such counsel fully cooperates with the Indemnifying Party's counsel. If the Indemnifying Party fails to promptly appoint competent and experienced counsel, the Indemnified Party may engage its own counsel in defense thereof, and the reasonable charges in connection therewith shall promptly be paid by the Indemnifying Party. If the Indemnified Party settles any such suit, claim or proceeding, the amount thereof shall be charged to the Indemnifying Party, provided that the Indemnifying Party's prior approval has been secured, which approval shall not be unreasonably withheld.
- 2) **Inspection Period** – Buyer is removing all contingencies with the exception of the items listed below.
  - a. **Loan Assumption:** Buyer to be approved by Seller's lender (the "Lender") to assume current Note and Deed of Trust (the "Loan"). Lender to provide Buyer, for Buyer approval, a document stating the costs associated with assuming the Loan. Loan approval and Loan cost approval to occur at least 10 days prior to Closing. If Lender does not approve Buyer, or Lender costs are unsatisfactory to Buyer, Buyer may terminate this Agreement and receive a full refund of Earnest Money.

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Tom O'Shea

510 648-0273

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- b. **Building Inspection:** Buyer, at Buyer's sole cost, shall contract to obtain a site inspection report. The report shall be completed and approved by Buyer on or before September 21, 2007. Should the report be unsatisfactory to Buyer for any reason, Buyer may terminate this Agreement and receive a full refund of Earnest Money.
- c. **Tenant Estoppel:** Seller to provide Buyer a Tenant Estoppel in like form to the one provided to Buyer on August 24, 2007 by facsimile with the Tenant acknowledging that there will be a rent increase in years four and eight as using the CPI formula outlined in Section 17 of the Lease. In addition, Tenant to attach to the Estoppel a list of all sublease tenants. The Tenant Estoppel to be approved by Buyer on or before September 21, 2007. This date may be extended should Seller require more time to obtain the Tenant Estoppel. Buyer approval to occur no later than 10 days prior to Closing.
- 3) **Earnest Money** - Within 2 business days of Seller approving this Addendum #2, Buyer shall increase Earnest Money to \$100,000. Once the above inspection items are completed, the Earnest Money shall become non-refundable.
- 4) **Warranty Deed** - Per line item 27 of Addendum 1, Buyer still has to approve the Warranty Deed. This shall occur no later than 10 days prior to Closing. Should Buyer not approve the Warranty Deed, Buyer may terminate the Agreement and receive a full refund of Earnest Money.
- 5) **Closing Date** - Closing Date to be extended to November 16, 2007.

Buyer:

Thomas O'Shea (Gentle)

Date:

Sept 6 07

Seller:

Gordon Arave  
(High Mark Development LLC)

Date:

9/10/07

Gordon Arave:

Gordon Arave  
(Gordon Arave)

Date:

9/10/07

Addendum #3  
To Purchase and Sale Agreement Dated August 14, 2007  
(the "Agreement")

- 1) **Indemnification of Buyer** – Both Buyer and Seller have accepted the language stipulated in Addendum #2 for the Indemnification of Buyer.
- 2) **Inspection Period** – Due to the timing stipulated in Addendum #2 of the Agreement, items a, b and c below have been updated to reflect the current status for removing these contingencies and now replace the corresponding items in Addendum #2.
  - a. **Loan Assumption:**
    - i. Buyer to be approved by Seller's lender (the "Lender") to assume current Note and Deed of Trust (the "Loan"). Loan approval to occur at least 10 days prior to Closing. If Lender does not approve Buyer, Buyer may terminate this Agreement and receive a full refund of Earnest Money.
    - ii. Buyer and Seller have agreed that Seller shall pay any all Lender costs, including Lender inspection and appraisal fees, if any that exceed 1% of the loan balance at Closing. Buyer agrees to pay any and all Lender fees up to 1% of the loan balance at Closing.
  - b. **Building Inspection:** Buyer has completed its inspection of the property. In order to remove all contingencies related to the building inspection, Buyer requires that Seller provide a list of all warranties for the property as stipulated on line item 141, page 3 of the Agreement. The warranty list shall include the responsible contractor, contact information and description of the warranty. Upon receipt of the warranties, Buyer shall have 2 business days from Buyers receipt to remove all contingencies related to the Building Inspection.
  - c. **Tenant Estoppel:** Buyer has reviewed the estoppel signed by Tenant on September 20, 2007 and does not approve the Estoppel. Attached as **Exhibit A** is a revised Estoppel that Buyer will approve when the Tenant has signed it. The Estoppel, signed by Tenant, must be received on or before October 9, 2007. Should Buyer not receive the signed Estoppel by this time, Buyer, at Buyer's sole discretion, may terminate this Agreement and receive a full refund of Earnest Money.
- 3) **Earnest Money** – Buyer has deposited \$100,000 in Earnest Money. Once the above inspection items are completed, the Earnest Money shall become non-refundable.
- 4) **Warranty Deed** – Per line item 27 of Addendum 1, Buyer still has to approve the Warranty Deed. This shall occur no later than 10 days prior to Closing. Should Buyer not approve the Warranty Deed, Buyer may terminate the Agreement and receive a full refund of Earnest Money.

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Addendum #3  
 To Purchase and Sale Agreement Dated August 14, 2007  
 (the "Agreement")

- 1) **Indemnification of Buyer** – Both Buyer and Seller have accepted the language stipulated in Addendum #2 for the Indemnification of Buyer.
- 2) **Inspection Period** – Due to the timing stipulated in Addendum #2 of the Agreement, items a, b and c below have been updated to reflect the current status for removing these contingencies and now replace the corresponding items in Addendum #2.
  - a. **Loan Assumption:**
    - i. Buyer to be approved by Seller's lender (the "Lender") to assume current Note and Deed of Trust (the "Loan"). Loan approval to occur at least 10 days prior to Closing. If Lender does not approve Buyer, Buyer may terminate this Agreement and receive a full refund of Earnest Money.
    - 9/24/07 ii. Buyer and Seller have agreed that Seller shall pay any all Lender costs, including Lender inspection and appraisal fees, if any that exceed 1% of the loan balance at Closing. Buyer agrees to pay any and all Lender fees up to 1% of the loan balance at Closing.
  - b. **Building Inspection:** Buyer has completed its inspection of the property. In order to remove all contingencies related to the building inspection, Buyer requires that Seller provide a list of all warranties for the property as stipulated on line item 141, page 3 of the Agreement. The warranty list shall include the responsible contractor, contact information and description of the warranty. Upon receipt of the warranties, Buyer shall have 2 business days from Buyers receipt to remove all contingencies related to the Building Inspection.
  - c. **Tenant Estoppel:** Buyer has reviewed the estoppel signed by Tenant on September 20, 2007 and does not approve the Estoppel. Attached as Exhibit A is a revised Estoppel that Buyer will approve when the Tenant has signed it. The Estoppel, signed by Tenant, must be received on or before October 9, 2007. Should Buyer not receive the signed Estoppel by this time, Buyer, at Buyer's sole discretion, may terminate this Agreement and receive a full refund of Earnest Money.
- 3) **Earnest Money** – Buyer has deposited \$100,000 in Earnest Money. Once the above inspection items are completed, the Earnest Money shall become non-refundable.
- 4) **Warranty Deed** – Per line item 27 of Addendum 1, Buyer still has to approve the Warranty Deed. This shall occur no later than 10 days prior to Closing. Should Buyer not approve the Warranty Deed, Buyer may terminate the Agreement and receive a full refund of Earnest Money.



5) Closing Date – Closing Date to remain as on or before November 16, 2007.

Buyer:

Thomas O'Shea

Date:

Fri. Sept 17

Seller:

\_\_\_\_\_  
(High Mark Development LLC)

Date:

\_\_\_\_\_

Gordon Arave:

\_\_\_\_\_  
(Gordon Arave)

Date:

\_\_\_\_\_

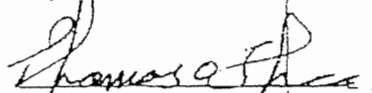
10/24/2007 WED 10:15 FAX 206 785 3496 Arave Const/Western Real

002/003

Addendum #4  
To Purchase and Sale Agreement Dated August 14, 2007  
(the "Agreement")

- 1) **Indemnification of Buyer** – Tenant has agreed to redact and release its option to purchase the Property stated in Recital B of the Lease. Upon Buyer's receipt of a signed amendment to the Lease confirming this, Buyer shall release Seller from this indemnification.
- 2) **Inspection Period** – Due to the timing stipulated in Addendum #3 of the Agreement, items a, b and c below have been updated to reflect the current status for removing these contingencies and now replace the corresponding items in Addendum #3.
  - a. **Loan Assumption:**
    - i. Buyer to be approved by Seller's lender (the "Lender") to assume current Note and Deed of Trust (the "Loan"). Loan approval to occur at least 10 days prior to Closing. Should Lender require additional time to approve Buyer or to complete assumption documents, Seller agrees to extend Closing to accommodate Lender assumption timeline. If Lender does not approve Buyer, Buyer may terminate this Agreement and receive a full refund of Earnest Money.
    - ii. Same as in Addendum #3.
  - b. **Building Inspection:** Buyer has completed its inspection of the property noting several minor items for repair. Seller has agreed to make the repairs at Seller's cost prior to Closing. Should the repairs not be completed by Closing, Seller agrees to leave \$5,000 in escrow until repairs are completed. If repairs are not completed within 30 days of Closing, Buyer shall receive the \$5,000 from escrow and make repairs itself. Other than these repair items, Buyer removes Building Inspection contingency.
  - c. **Tenant Estoppel:** Buyer accepts the estoppel signed by Tenant on October 17, 2007.
- 3) **Earnest Money** – Buyer has deposited \$100,000 in Earnest Money. Once Item 2) a. above is completed the Earnest Money shall become non-refundable.
- 4) **Warranty Deed** – Same as Addendum #3.
- 5) **Closing Date** – Closing Date to remain as on or before November 16, 2007 unless Lender requires additional time for assumption process.

Buyer:



Date:

Oct 26 07.

Seller:

  
(High Mark Development LLC)

Date:

10/24/07

Date: 5/12/09

O'Shea

T&amp;T REPORTING

RE-11 ADDENDUM JULY, 2007 EDITION

PAGE 1 OF 1



RE-11 ADDENDUM # 5

(1,2,3, etc.)



Date: December 5, 2007

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

This is an ADDENDUM to the ☒ Purchase and Sale Agreement | Other \_\_\_\_\_  
 ("Addendum" means that the information below is added material for the agreement (such as lists or descriptions) and/or means the form is being changed, corrected or revised the agreement (such as modification, addition or deletion of a term)).

AGREEMENT DATED: August 9, 2007

ID #1992

ADDRESS: 1675 Curlew

BUYER(S): O'Shea Family Trust

SELLER(S): High Mack Development LLC

The undersigned parties hereby agree as follows:

Closing date to be on or before December 12, 2007

Title Company responsible for closing will be changed to Idaho Title and Trust located in Idaho Falls

All other terms and conditions to remain the same.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

BUYER: Thomas O'Shea

Date: Dec 5 2007

BUYER: [Signature]

Date: Dec 5 2007

SELLER: \_\_\_\_\_

Date: \_\_\_\_\_

SELLER: \_\_\_\_\_

Date: \_\_\_\_\_

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RE-11 ADDENDUM JULY, 2007 EDITION

PAGE 1 OF 1



RE-11 ADDENDUM # \_\_\_\_\_ (1,2,3, etc.)

Date: December 9, 2007

THIS IS A LEGALLY BINDING CONTRACT. READ THE ENTIRE DOCUMENT INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING.

1 This is an ADDENDUM to the ☒ Purchase and Sale Agreement ☐ Other \_\_\_\_\_  
 2 ("Addendum" means that the information below is added material for the agreement {such as lists or descriptions} and/or means the form is being u  
 3 to change, correct or revise the agreement {such as modification, addition or deletion of a term}).  
 4

5 AGREEMENT DATED: August 9, 2007 ID # 1980

6 ADDRESS: 1675 Curlew

7 BUYER(S): O'Shea Family Trust

8 SELLER(S): High Mark Development LLC

9 The undersigned parties hereby agree as follows:

10 Closing date to be on or before December 12, 2007

11 Title Company responsible for closing will be changed to Idaho Title and Trust located in Idaho Falls

12 All other terms and conditions to remain the same.

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32 To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all p

33 Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all pr

34 Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. Upon its execution by both parties, l

35 agreement is made an integral part of the aforementioned Agreement.

36

37 BUYER: \_\_\_\_\_ Date: \_\_\_\_\_

38 BUYER: \_\_\_\_\_ Date: \_\_\_\_\_

39 SELLER: High Mark Dev. LLC Date: 12-9-07

40 SELLER: Gordon Brown Date: \_\_\_\_\_

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798

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE  
O'SHEA, Trustees of the Thomas and Anne  
O'SHEA Trust u/d/t DATED NOVEMBER 2,  
1998; GRANDVIEW CREDIT, LLC, a  
California limited liability company; CALEB  
FOOTE, an individual, KATE LARKIN  
DONAHUE, an individual, JOHN KEVIN  
DONAHUE, an individual, and SAN  
FRANCISCO RESIDENCE CLUB, INC., a  
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an Idaho  
limited liability company; GORDAN ARAVE,  
individually and as Officer of High Mark  
Development, LLC; BENJAMIN D. ARAVE,  
individually and as Officer of High Mark  
Development, and JOHN DOES I-X.

Defendants.

Case No. CV-08-4025

**MEMORANDUM DECISION  
AND ORDER**

This matter comes before the Court on Defendants' Motion to Dismiss  
Plaintiffs' Complaint pursuant to Rule 12(b)(6), I.R.C.P.

**I. CLAIMS ASSERTED**

Plaintiffs have brought this action against Defendants seeking relief based  
upon a real estate transaction. The Complaint alleges that the Parties entered into

negotiations for the purchase of an office building in Ammon, Idaho, wherein it was represented and/or understood that the property came with a tenant and a ten year triple net lease. Again, according to the Complaint, Plaintiffs sought and obtained a certificate verifying the terms and conditions of the tenancy including a statement that the tenant was not in default on any lease payments.

Plaintiffs assert that they purchased the property believing that the tenant had been making regular payments, and would continue to make regular lease payments. Plaintiffs allege that subsequent to the purchase of the property in December 2007, they became aware that the tenant was in default on lease payments at the time of the tenancy certification and purchase. Plaintiffs allege that the tenant furthermore made no lease payments to Plaintiffs up through the time the tenant vacated the property in March 2008.

Plaintiffs' Complaint identifies five claims or theories of recovery. Each claim is asserted against the "Defendants" generally. Those claims are as follows: Count 1 alleges a breach of contract; Count 2 alleges a breach of the covenant of good faith and fair dealing; Count 3 alleges negligent and/or fraudulent misrepresentation; Count 4 alleges negligent and/or fraudulent concealment of fact material to transaction; and Count 5 alleges a right to an abatement of the purchase price.

## **II. STANDARD**

Rule 12(b)(6), I.R.C.P., provides that a defendant can bring a motion to dismiss when the pleadings fail to "state a claim upon which relief can be granted". In considering such a motion, the court is limited to the allegations

of the complaint and facts upon which the court may take judicial notice.

*Helickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (App. 1990). The nonmoving party is entitled to have all inferences from the pleadings viewed in its favor and motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975); *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005). The issue is not whether the plaintiff will ultimately prevail, but whether the party

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is entitled to offer evidence to support the claims. *Orthman v. Idaho Power Co.*,

126 Idaho 960, 962, 895 P.2d 561, 563 (1995); *Gibson v. Bennett*, 141 Idaho 270, 108 P.3d 417 (App. 2005).

### III. ANALYSIS

#### A. Alleged liability of Gordon Arave and Benjamin D. Arave.

Defendants assert that the individual defendants can not be subjected to liability based upon their interest in High Mark Development, LLC. As set out in the complaint, each Arave was sued "individually and as officer of High Mark Development". Defendants correctly argue that Idaho law does not permit liability of an individual solely be reason of being a member of a limited liability company. Idaho Code § 53-619 and § 53-620.

Counts 1 and 2 of Plaintiffs' Complaint allege a breach of the "Commercial Purchase and Sale Agreement" and a breach of the covenant of good faith and fair dealing respectively. These two Counts can be considered together since the implied covenant of good faith and fair dealing is a covenant



implied by law in the subject contract, and essentially derivative of the contract.  
*Steiner v. Ziegler-Tamura Ltd., Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2002).

The Court's reading of Plaintiffs Complaint establishes that the "seller" of the subject property was High Mark Development, LLC.<sup>1</sup> As such, the party to the subject purchase contract was the LLC, not the individual members of the LLC. The Court finds that the Complaint does not state a viable claim for breach of contract or breach of the covenant of good faith and fair dealing as against the Araves.

As to allegations of fraud, an officer or principal of an otherwise legal entity may still be personally liable for fraudulent conduct. A jury instruction approved by the Idaho Supreme Court in *VFP VC v. Dakota Co.*, 141 Idaho 326, 334, 109 P.3d 714, 722 (2005) is instructive:

It is an established principle of corporations [sic] law that corporate directors are not liable merely by virtue of their office for fraud or other tortious wrongdoing committed by the corporation or its officers. Instead, to be held liable a corporate director must specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers. For Mr. Durkin to be held personally liable for any torts committed by Dakota Co. or LJD Holdings or B & D Foods, the evidence must establish that he specifically directed, actively participated in, or knowingly acquiesced in the fraudulent activities as president of Dakota Co. or LJD Holdings Inc. or B & D Foods.

Under Idaho law, the Araves would be subject to personal liability to the extent they committed fraud.

Defendants however assert that the fraud claims should be dismissed because they are not alleged with particularity. Rule 9(b), I.R.C.P. requires that when pleading fraud, "the circumstances constituting fraud . . . shall be stated with particularity". Based on the

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<sup>1</sup> See specifically Plaintiffs' Complaint, ¶ 16 and Exhibit F, Addendum No. 1.

Court's review of the Complaint, the Court finds that the circumstances constituting the alleged fraud are set out with sufficient particularity.

#### **B. Plaintiffs' Claim for Abatement**

Defendants also seek a dismissal of Plaintiffs' claim for Abatement (Count 5). Defendants assert that the facts as alleged in the Complaint do not give rise to a claim of abatement. The Court agrees. As alleged in the Complaint, this is not a case where the sale of property was based upon acreage, with a resulting deficiency in the amount of acreage actually purchased. The Idaho Courts' application of abatement of a purchase price has been limited to situations where the sale has been based upon a specified amount of acreage.

In *Continental Life Ins. Co. v. Murphy*, 55 Idaho 573, 44 P.2d 1112 (1935), this court held that if a sale of land is a sale in gross, and not by the acre, a purchaser is not entitled to a diminution of the purchase price for a deficiency in acreage. See also *Speedway Enterprises, Inc. v. Hartsell*, 75 Ariz. 36, 251 P.2d 641 (1952); *Meyer v. Ranson*, 80 Ill.App.2d 175, 224 N.E.2d 293 (1967). On the other hand, this court in *Lies v. Mulhall*, 31 Idaho 205, 169 P. 1165 (1918), stated:

'The rule is well settled that: 'Where a sale of land is by the acre or specific quantity, as where it is at so much an acre or foot, and it is evident that the quantity, or number of acres, specified is of the essence of the contract, the purchaser is entitled to an abatement of the purchase price for a deficiency in the quantity represented to be sold. \* \* \*;' (citing cases.) And whether the vendor knowingly misrepresented the number of acres is immaterial.' 31 Idaho at 210. 169 P. at 1166.

*Dixon v. Morse*, 93 Idaho 448, 449, 463 P.2d 284, 285 (1969).

While Plaintiffs may seek damages or rescission based upon an alleged breach of the purchase agreement, an adjustment of the purchase price under the theory of abatement is not available in view of the factual allegations set out in the Complaint.

#### IV. CONCLUSION AND ORDER

Defendants' Motion to Dismiss is granted in part, and denied in part. Specifically, Plaintiffs' claims asserting a breach of contract and breach of the covenant of good faith and fair dealing are dismissed as against Gordon Arave and Benjamin D Arave. Plaintiffs' claim for abatement is also dismissed. The remainder of Defendants' Motion to Dismiss is denied.

DATED this 26 day of September, 2008.

  
JOEL E. TINGEY  
DISTRICT JUDGE

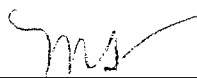
#### CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of September, 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Gregory L. Crockett  
HOPKINS RODEN CROCKETT  
428 Park Avenue  
P.O. Box 51218  
Idaho Falls, ID 83405-1219

Richard J. Armstrong  
WOOD CRAPO  
500 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk

R

805

1:45 PM  
08/28/07  
Accrual Basis

The Children's Center  
Balance Sheet  
As of August 28, 2007

	Aug 28, 07
<b>ASSETS</b>	
Current Assets	
Checking/Savings	
KeyBank	1,496.30
Payroll 2	1.69
Savings	15,437.22
Total Checking/Savings	16,935.21
Accounts Receivable	
Accounts Receivable	
Employee	500.00
Rent Receivable	5,676.74
Accounts Receivable - Other	-3,944.73
Total Accounts Receivable	2,232.01
State of Idaho	-2,381.91
Total Accounts Receivable	-149.90
Other Current Assets	
Payroll Asset	-25.00
Total Other Current Assets	-25.00
Total Current Assets	16,760.31
Fixed Assets	
Building Improvement	27,846.41
Total Fixed Assets	27,846.41
Other Assets	
Accumulated Depreciation	-20,397.00
Office Equipment	
Computers	16,114.37
Furniture	67,273.13
IBI	-59,694.47
Partial Care	1,164.30
Pictures/Decorations	1,599.22
Office Equipment - Other	44,519.30
Total Office Equipment	70,975.85
Total Other Assets	50,578.85
<b>TOTAL ASSETS</b>	<b>95,185.57</b>
<b>LIABILITIES &amp; EQUITY</b>	
Liabilities	
Current Liabilities	
Accounts Payable	
Accounts Payable	96,041.66
Total Accounts Payable	96,041.66
Credit Cards	
Sams Club	707.32
Sams Club Credit Card	70.87
Total Credit Cards	778.19
Other Current Liabilities	
1319 Security Deposit	1,450.00
Payroll Liabilities	136,645.62
Total Other Current Liabilities	138,095.62
Total Current Liabilities	234,915.47
Long Term Liabilities	
Notes Payable	
Dr. Carol Vance	6,000.00
Dr. Martindale	14,580.00

02:55 PM

08/28/07

Accrual Basis

The Children's Center  
**Balance Sheet**  
As of August 28, 2007

	Aug 28, 07
Dr. Saccamondo	-505.02
Jared and Gordon Arave	187,929.40
M. Smith Enterprises	200,539.00
Matt Smith	78,083.28
Matt Smith Payroll Reimbursemen	20,000.00
Tamara Bradley	31,000.00
Total Notes Payable	537,626.66
Total Long Term Liabilities	537,626.66
Total Liabilities	772,542.13
Equity	
Dividends	-71,465.00
Opening Bal Equity	-201,582.19
Paid in Capital	
Dale Schneider	24,000.00
Laurie Roth	10,000.00
Tamara Bradley	10,000.00
Paid in Capital - Other	-4,000.00
Total Paid In Capital	40,000.00
Retained Earnings	-293,994.43
Net Income	-150,314.94
Total Equity	-677,356.56
TOTAL LIABILITIES & EQUITY	95,185.57

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808

## Promissory Note

Page 1 - \$199,900.00

### 1. Initial information

Date of Note: April 18, 2007.

Maturity Date: May 3, 2014.

Principal Sum: \$199,900.00

Annual Interest Rate: 6.75% per annum

Monthly Payments: Debtor shall make 84 equal monthly payments of \$2,992.65 to Creditor. The first monthly payment shall be due on May 3, 2007. A like monthly payment shall be made on the 1st day of each month thereafter to Lender. The entire principal and interest shall be paid in full no later than May 3, 2014.

Made at: Idaho Falls, Idaho

Debtor/Borrower: The Children's Center Inc. of Idaho Falls, Idaho

Creditor/Lender/Holder: Jared Arave & Gordon Arave of Blackfoot, Idaho.

### 2. Background

Lender and Borrower have entered into a loan Agreement dated April 18, 2007. Lender has agreed to lend to Borrower \$149,925.00, by means of rent deferral for the months of September, 2006 thru January, 2007. Borrower has received \$149,925.00, by means of rent deferral, and additional cash to the sum of \$49,975.00, and gives Lender this Promissory Note in exchange. By signing this promissory note Lender agrees that all past promissory notes and debt for deferred rent payments owed by Borrower to High Mark Development, LLC, Gordon Arave, or any entity in which Gordon Arave has an interest in, is cancelled and replaced by this promissory note.

### 3. Borrower's promise to repay

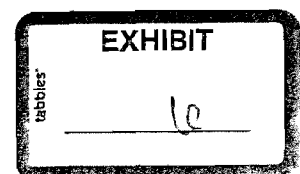
In return for the consideration of the transfer of the funds to the Corporation, Borrower promise to pay to order of Lender the Principal Sum plus interest in money of the United States of America. Lender may transfer this note; and Lender or anyone to whom this note is transferred is called the "holder."

### 4. Interest

Interest will be charged on the unpaid Principal Sum at the annual interest rate of 6.75% until the full amount of the principal has been paid. The interest will accrue daily and start on the Date of Note. The Annual Interest Rate required by this section is the rate before default. If there is a default, then the Default Interest Rate will apply from the date of the default until the default is cured. The Default Interest Rate is 8% per annum.

### 5. Payments

Beginning on May 3, 2007 and on the 1<sup>st</sup> day of the month for each following month until May 3, 2014, Borrower will make Monthly principal and interest payments as described in section 1. On May 3, 2014, Borrower will pay all amounts still owing under this note. Borrower may make a full prepayment without penalty prior to May 3, 2014. All payments whenever made will be applied in the following order: 1) interest, and 2) principal. If Borrower makes a prepayment, that will not excuse Borrower from making any other payments due under this note.





Page 2 -- \$199,900.00

Borrower will make all payments to Lender's address specified above, or at a different place if required by the Lender or holder.

## 6. Borrower's failure to repay

### Default

Borrower will be in default if:

Borrower does not make any payments under this note when due; Borrower (a) makes an assignment for the benefit of creditors, (b) files a petition in bankruptcy, (c) is adjudicated insolvent or bankrupt under the federal bankruptcy code as now or later in effect, or under any applicable state insolvency law; or if there is started against Borrower any bankruptcy, insolvency or other similar proceeding which has not been dismissed by the 60th day after the date on which the proceeding was started, or Borrower consents to or approves of any such proceeding or the appointment of any receiver for us or any substantial part of Borrower's property, or the appointment of any such receiver is not discharged within 60 days.

### Acceleration

If Borrower is in default, the holder may send Borrower a written notice stating that if Borrower does not pay the overdue amount by a certain date, the holder may require Borrower to pay immediately the full amount of unpaid principal and all the accrued interest. That date must be at least sixty days after the date on which the notice is delivered or mailed.

### Preservation of holder's rights

After default, even if the holder does not require Borrower to pay immediately the full amount of unpaid principal and all of the interest on the note, the holder will still have the right to do so if Borrower remains in default.

### Payment of holder's costs and expenses

If Borrower is in default, the holder will have the right to be repaid by Borrower for all of its costs and expenses in enforcing this note to the extent not prohibited by applicable law. Those expenses include, but are not limited to, reasonable attorney's fees.

## 7. Giving the notices

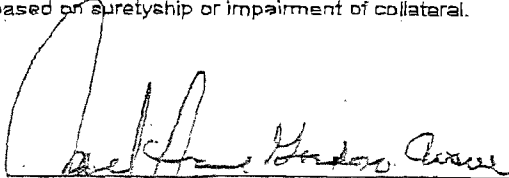
Unless applicable law requires a different method, any notice that must be given to Borrower under this note will be given by delivering it or by mailing it by first class mail to Borrower at the address shown at the beginning of this note, or at a different address if Borrower gives the holder a notice of its different address using the procedure in the next paragraph. Any notice that must be given to the holder under this note (such as, for example, a notice of different address) will be given by mailing it by first class mail to the holder at the address stated in section 1 above, or at a different address if Borrower is given a notice of that different address using the procedure in the paragraph immediately above.

## 8. Waivers

Borrower and any other person who has obligations under this note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the holder to demand payment of amounts due. "Notice of dishonor" means the right to require the holder to give notice to other persons that amounts due have not been paid. Borrower waives defenses based on suretyship or impairment of collateral.

  
Matthew F. Smith, President      Date 4/18/07

The Children's Center Inc.

  
Jared Arave & Gordon Arave      Date 4/18/07